No. 18-60606

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATE OF TEXAS; GREG ABBOTT, GOVENOR OF TEXAS; TEXAS COMMISSION ON ENVIRONMENTAL QUALITY; SIERRA CLUB,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; ANDREW WHEELER, Administrator of the United States Environmental Protection Agency

Respondents.

Petition for Review of Final Administrative Action
of the United States Environmental Protection Agency

BRIEF OF RESPONDENTS

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DATE: March 8, 2019

CORPRATE DISCLOUSRE STATEMENT AND CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fed. R. App. P. 28 and Fifth Circuit Rule 28.2.1, Respondent Environmental Protection Agency ("EPA") is a governmental entity and Respondent Andrew Wheeler is sued in his official capacity as Administrator of EPA, and as such a corporate disclosure statement and certificate of interested persons is not required.

So certified this 8th day of March, 2019 by

/s/ *Perry M. Rosen*
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STATEMENT REGARDING ORAL ARGUMENT

Respondents, the Environmental Protection Agency ("EPA") and its Administrator, Andrew Wheeler, agree with Petitioners that oral argument is appropriate and would be helpful to the Court. This case involves the application of important provisions of the Clean Air Act administered by EPA. Such application can have significant impacts on the State, the specific counties that are the subject of the challenged order, and impacted citizens. This case further involves technical determinations made by EPA which may raise questions or warrant further explanation that can be explicated at oral argument.

RECORD REFERENCES

As noted in footnote 3 of Respondents' brief, Respondents are following the same convention as both sets of Petitioners in citing to the record. This uses "C.I." and the last four digits of the document as listed the Certified Index to the administrative record to refer to each record document cited. As Petitioner Texas reports, pursuant to Firth Circuit Rule 30.2(a), Texas will file a Joint Appendix containing the portions of the record cited by all parties. Texas Br. 1.

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GLOSSARY

CAA	Clean Air Act
CBSA	Core Based Statistical Area
C.I.	Certified Index to the Administrative Record
EPA	Environmental Protection Agency
HYSPLIT	Hybrid Single Particle Lagrangian Integrated Trajectory
NAAQS	National Ambient Air Quality Standards
NOAA	National Oceanic and Atmospheric Administration
PM	Particulate Matter
ppb	Parts per Billion
ppm	Parts per Million
RTC	Response to Comments
TCEQ	Texas Commission on Environmental Quality
TSD	Technical Support Document (Final)

JURISDICTION

Petitioners State of Texas, Texas Governor Greg Abbott, and the Texas Commission on Environmental Quality ("TCEQ") (collectively "Texas" or the "State") and Petitioner Sierra Club separately challenge a final agency action of Respondents, United States Environmental Protection Agency and its Administrator, Andrew Wheeler (collectively "EPA"), entitled "Additional Air Quality Designations for the 2015 Ozone National Ambient Air Quality Standards – San Antonio, Texas Area, 83 Fed. Reg. 35,136 (July 25, 2018) ("Final Designation"). EPA agrees that the Court has jurisdiction over this matter under 42 U.S.C. § 7607(b)(1). EPA disputes Sierra Club's assertion that "venue is proper in the D.C. Circuit, not here." Sierra Club Br. 2.

STATEMENT OF THE ISSUES

1. On October 26, 2018, this Court granted Texas's motion to confirm that venue over this action lies in this Court. In addition, over Sierra Club's objection, the D.C. Circuit transferred to this Court an identical challenge to the Final Designation that Sierra Club had filed in that court. The issues related to venue are:

A. Where both this Court and the D.C. Circuit already have determined that venue is proper in this Court, and this Court gave no indication that it would entertain additional argument or evidence on this issue and directed

the parties to brief the merits, may Sierra Club submit yet another challenge to the venue of this Court, or is it barred from doing so under the law-of-the-case doctrine?

B. A challenge to an EPA final action under the Clean Air Act, 42 U.S.C. §§ 7401-7671q ("CAA" or "Act"), "which is locally or regionally applicable," must be filed "*only* in the United States Court of Appeals for the appropriate [local] circuit," *unless* EPA publishes an express finding that the challenged agency action is based on a determination of nationwide scope or effect. 42 U.S.C. § 7607(b)(1) (emphasis added). Where EPA neither made nor published such a finding, and where the challenged Final Designation relates in its entirety to air quality in counties located in this Circuit and is based on technical conclusions related to data collected at three local air quality monitors, local wind patterns, local population and traffic patterns, and other wholly localized data relating to an eight-county area in and around San Antonio, Texas ("San Antonio area"), does this Court possess venue to adjudicate the claims in this case?

2. Where EPA is required by statute to designate each county (or similar area) in the United States as either in attainment, nonattainment or unclassifiable with respect to the CAA's National Ambient Air Quality Standards ("NAAQS") for specific pollutants, including ground level ozone (hereinafter "ozone"), and where Texas's own air quality ozone monitoring stations establish *without dispute*

that Bexar County exceeds the NAAQS for ozone, did EPA act in accordance with the law in designating Bexar County as nonattainment?

3. Where there is no evidence -- or claim -- that nearby Atascosa, Comal, and Guadalupe Counties are themselves in violation of the ozone NAAQS, did EPA nevertheless act beyond its authority or in an arbitrary and capricious manner in designating these counties attainment/unclassifiable, having found that there is not sufficient evidence to warrant designating them as nonattainment based on purported contributions to Bexar County's nonattainment?

INTRODUCTION

A key set of provisions of the CAA require EPA to establish national air quality standards designed to protect public health and welfare. EPA performs this task first by establishing ceilings for the concentration in the ambient air of certain pollutants, in the form of National Ambient Air Quality Standards (NAAQS). 42 U.S.C. §§ 7408-7409. As pertinent here, in 2015 EPA set the allowable level (i.e., the NAAQS) for ozone at 70 parts per billion ("ppb"), thereby establishing what is referred to as the "2015 ozone NAAQS".

EPA is then required to assess the air quality in all areas of the United States and designate whether each area either (a) is attaining the NAAQS, (b) is in nonattainment with the NAAQS, or (c) is unclassifiable based on a lack of data

sufficient to make a designation. 42 U.S.C. § 7407 (titled "Designations").[1] Although states provide information to EPA relating to each county's air quality and recommend initial designations of attainment or nonattainment, it is EPA that promulgates the final designations, making whatever modifications to the state's recommendation it deems necessary. This determination is heavily data-driven. Where the data exhibits that a county exceeds the NAAQS for a regulated pollutant (in this case 70 ppb for ozone), it is deemed nonattainment. A county may also be deemed nonattainment if EPA determines that it contributes to the nonattainment of a nearby county. 42 U.S.C. § 7407(d).

Pursuant to its statutory responsibility, EPA promulgated ozone NAAQS designations for each county in the eight-county San Antonio area. Because three years of data gathered from three air quality monitors in Bexar County demonstrated that air quality in Bexar County presently is in violation of the ozone NAAQS (a conclusion that no party disputes), EPA designated Bexar County nonattainment. For the seven counties surrounding Bexar County that lacked certified air quality monitors (which is typical for non-metropolitan counties), EPA used its well-established five-factor "weight-of-the-evidence" test to analyze

[1] EPA generally conducts NAAQS ozone designations by focusing on multi-county areas, establishing a designation for each county (or other similar jurisdiction, such as a parish or city, as defined by a State) within the designated area. 83 Fed. Reg. at 35,138, n.4.

whether these counties contributed to the air quality of Bexar County – a test that no party disputes is the proper test. EPA found that none of the surrounding counties should be deemed nonattainment, either based on the air quality within each county or based on contribution of emissions from those counties to Bexar County's nonattainment.

Texas asserts that although the certified monitoring data unequivocally establish that Bexar County currently exceeds the 2015 ozone NAAQS of 70 ppb, the County can nonetheless be deemed attainment based on Texas's predictions that it will meet that standard in the future. Predictions of future attainment of Bexar County are, however, based on inherently uncertain modeling of future emission levels. EPA thus concluded that these predictions cannot overcome the finding that Bexar County is nonattainment, either legally (the Designation provision of the CAA is unambiguously written in the present tense) or factually (predictions cannot override undisputed data establishing that Bexar County presently is in nonattainment with the 2015 ozone NAAQS).

Conversely, Sierra Club challenges EPA's designation of Atascosa, Comal, and Guadalupe Counties ("Nearby Counties") as attainment/unclassifiable. It asserts that these counties should be designated nonattainment, arguing that emissions from within those counties contribute to the nonattainment of Bexar County. EPA utilized a data-driven analysis conducted under its five-factor

"weight-of-the-evidence" test, and found that the data did not support such a nonattainment designation for these nearby counties. Mostly avoiding this test, Sierra Club argues that EPA must apply a bright-line numeric threshold to assess "contribution nonattainment." But such a threshold is found nowhere in the actual statutory provision at issue, nor does it otherwise define when a contribution of a nearby county suffices to deem that county nonattainment. Use of such a threshold is neither supported by the law (there is no applicable bright-line test) nor the facts (Sierra Club cherry picks limited data points and misapplies them).

To a large extent, as has occurred in other cases involving designations under the NAAQS program, EPA once again "finds itself in a situation reminiscent of *Goldilocks and the Three Bears*." *Mississippi v. EPA*, 744 F.3d 1334, 1348 (D.C. Cir. 2013). Too many attainment counties for some (Sierra Club), too few attainment counties for others (Texas). In reality, EPA considered the technical evidence specific to the subject counties through application of the same well-accepted factors it has historically applied. EPA further utilized its expertise and experience, as evidenced by the record. Based on these actions, EPA then exercised the considerable discretion granted to it by Congress to make designations that are fully consistent with the statute. While EPA's conclusions may be subject to debate, as almost any data-driven technical determination is, they are decidedly not arbitrary, capricious or beyond its statutory authority.

STATEMENT OF THE CASE

I. GROUND LEVEL OZONE

Ground level (or ambient) ozone is a component of smog. It is distinguished from stratospheric ozone (sometimes referred to as the "ozone layer"), which protects human health and the environment by absorbing ultraviolet radiation. *NRDC v. EPA*, 464 F.3d 1, 3 (D.C. Cir. 2006). Ambient ozone is associated with health effects, including decreased lung function and respiratory symptoms, as well as with impacts on the environment, including effects on trees, vegetation, and crops, and indirect effects on other ecosystem components such as soil, water, and wildlife. *Mississippi Comm'n on Envtl. Quality v. EPA*, 790 F.3d 138, 147 (D.C. Cir. 2015), citing *South Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 887 (D.C. Cir. 2006).

Ozone (O_3) is typically not emitted directly into the air. Instead it forms when nitrous oxides ("NO_x") and volatile organic compounds ("VOCs") (both "precursors" of ozone), react with sunlight, which occurs at different rates at different times of the year and under various types of weather conditions. *Id.*; *Am. Petroleum Inst. v. Costle*, 665 F.2d 1176, 1181 (D.C. Cir. 1981). States cannot, of course, enact provisions to control the amount or intensity of sunlight or when and under what circumstances the chemical reactions forming ozone occur. Accordingly, "NAAQS compliance largely depends on reducing emissions from

ozone precursor producers like power plants, industrial compounds, motor vehicles, and combustion engines." *Mississippi Comm'n*, 790 F.3d at 147.

II. STATUTORY FRAMEWORK

The Clean Air Act, 42 U.S.C. §§ 7401-7671q (CAA), establishes a comprehensive program to protect and enhance the Nation's air quality through a Congressionally-specified system of shared federal and state responsibility. *Id.* § 7401(b)(1); *BCCA Appeal Group v. EPA*, 355 F.3d 817 (5th Cir. 2003). Central to this program is the establishment and enforcement of the NAAQS, which occurs through a three-step process. Although this case involves solely a challenge to EPA's area designations under Step Two, all three steps are outlined below.

A. Step One: Establishment of the NAAQS

In Step One, EPA is required to establish NAAQS for criteria pollutants, the attainment of which will provide requisite protection to public health and welfare. 42 U.S.C. § 7409. EPA establishes the NAAQS for each covered pollutant based on the scientific information and data available at the time the NAAQS is established. While the costs of compliance strategies to attain the NAAQS may be of significant concern to states, localities and regulated entities, EPA may not take cost into account when setting the NAAQS. *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 471 (2001) (the Act "unambiguously bars cost considerations from the NAAQS-setting process."). EPA is required to

periodically review and, if appropriate, revise the NAAQS for each criteria pollutant based on the latest scientific evidence related to the health and welfare impacts of that pollutant. 42 U.S.C. § 7409(d); *Mississippi v. EPA*, 744 F.3d at 1339.

B. Step Two: Area Designations of Attainment, Nonattainment, and Unclassifiable

1. The Bases for NAAQS Designations

In Step Two (the designation process), EPA promulgates designations for each county or similar area of the country. EPA typically groups counties by recognized metropolitan statistical areas (the Core Based Statistical Area or "CBSA"). Any area that meets the NAAQS for the pollutant in question and does not contribute to a violation in a nearby area is deemed "attainment." An "unclassifiable" area is one that "cannot be classified on the basis of available information as meeting or not meeting the [NAAQS]." 42 U.S.C. § 7407(d)(1)(A)(ii), (iii). EPA often combines the two in labeling ("attainment/unclassifiable"), partially because the requirements for both types of areas are essentially indistinguishable. *Masias v. EPA*, 906 F.3d 1069, 1072 (D.C. Cir. 2018).

An area is deemed "nonattainment" if it "does not meet (or [ ] contributes to ambient air quality in a nearby area that does not meet) the national primary or secondary ambient air quality standard [NAAQS] for the pollutant." 42 U.S.C.

§ 7407(d)(1)(A)(i).[2] For ozone, nonattainment is further divided into five classifications, ranging from marginal nonattainment to extreme nonattainment, based on the severity of the ozone air quality problem in the area. 42 U.S.C. § 7511 (updated at 40 C.F.R. § 51.1303 to reflect 8-hour design values); 83 Fed. Reg. 10,376, 10,380, Table 2 (March 9, 2018). While all five classifications are, by definition, nonattainment, Congress requires areas in different classifications to implement different actions to attain the NAAQS, and to do so pursuant to different deadlines. 42 U.S.C. §§ 7511, 7511a. *See also* 83 Fed. Reg. at 35,139/3 ("Areas in the lower classification levels have fewer and/or less stringent mandatory air quality planning and control requirements than those in higher classifications."); *Galveston-Houston Ass'n for Smog Prevention v. EPA*, 289 Fed. Appx. 745, 747 (5th Cir. 2008).

Congress expressly directed EPA to establish an air quality monitoring system throughout the United States that would, *inter alia*, establish air quality monitoring in major urban and other appropriate areas, establish a uniform air quality index, and ensure that there is a process for considering when exceptional

[2] EPA is required to set "primary" or health-based NAAQS that are requisite to protect public health, allowing an adequate margin of safety. *Id.* § 7409(b). EPA also must set "secondary" or welfare-based NAAQS, that are requisite to protect against "any known or anticipated adverse effects" associated with the pollutant's presence in the ambient air. *Id.* § 7409(b)(2). "Welfare effects" include effects on soils, water, crops, vegetation, wildlife, and climate (generally termed environmental effects). *Id.* § 7602(h).

events might influence monitoring results. 42 U.S.C. § 7619. In accordance with Congress's mandate, EPA requires every state to establish a network of monitoring stations to collect ozone air quality data. 40 C.F.R. pt. 58, Appx. D. The regulations require that monitors be placed in counties based on population size. Accordingly, many rural counties do not have air quality monitors. *Mississippi Comm'n,* 790 F.3d at 154. There are rigorous requirements governing the collection of data from such monitors as well as testing and certification of the monitors. 40 C.F.R. pt. 58. *See also Mississippi Comm'n*, 790 F.3d at 156-57 (describing the monitoring quality control and validation process and its "exhaustive technical specifications."); *Catawba County, N.C. v. EPA*, 571 F.3d 20, 30 (D.C. Cir. 2009) (same).

With regard to the 2015 ozone NAAQS, EPA determines attainment based on the most recent three consecutive years of monitoring data meeting the agency's regulatory requirements (i.e. from "regulatory monitors") under 40 C.F.R. parts 53 and 58. If such data shows that the annual fourth-highest daily maximum 8-hour average of ozone exceeds a concentration of 70 ppb, it is deemed a violation. 40 C.F.R. pt. 50, Appx. U. *See also* 83 Fed. Reg. at 35,139, n.5 (explaining that the

number this formula generates, e.g., 70 ppb of ozone, is labeled the "design value."); Texas Br. 9; C.I. 0061 (EPA "2015 Guidance") at 3-5.[3]

Because, as noted, monitors are only required in major urban and other appropriate areas, many counties do not maintain regulatory (i.e., qualified) air quality monitors. If a county with a monitor is found to be violating the standard, EPA uses a five-part "weight-of-the-evidence" analysis to assess whether a nearby county is contributing to nonattainment in the county with the violating monitor. Those factors are: (1) air quality data (certified monitoring data and related data); (2) emissions related data such as levels of emissions of precursors (NOx and VOCs in the case of ozone), including locations of key sources of these precursors like power plants and traffic routes; (3) meteorology (weather, wind and air transport patterns); (4) geography/topography; and (5) jurisdictional boundaries. C.I. 0061 at Attachment 3; Sierra Club Br. 8.

2. The Process for NAAQS Designations

The Governor of a state makes "initial designations" for the counties within his/her state following promulgation of a revised NAAQS. 42 U.S.C. § 7407(d)(1)(A). Although the state's initial designations are an important part of the statutory process, ultimately they function as recommendations to EPA, which

[3] EPA adopts the same record reference regime employed by Petitioners, with "C.I." referring to the numbered document in the Certified Index filed with the Court.

is the body expressly directed to make the actual designation of attainment or nonattainment for each county. 42 U.S.C. § 7407(d)(1)(B)(i) (titled "Promulgation by EPA of Designations" and stating that "the Administrator shall promulgate the designations of all areas or portions thereof."). Thus, in reviewing the state's recommendation, "the Administrator may make such modifications as the Administrator deems necessary to the designations of the areas . . . ." *Id.* § 7407(d)(1)(B)(ii).

While it is ultimately EPA's responsibility to determine and promulgate the designations for each county in the United States, EPA does not do so without regard to a state's initial designation. If EPA disagrees with the state's initial designation, it must notify the state of its intended modification and give the state 120 days to respond before it issues a final designation. *Id.* § 7407(d)(1)(B)(ii). While EPA is not required by statute to issue its intended designations for public review and comment, *id.* § 7407(d)(2)(B), it typically does so, thereby allowing interested parties to submit competent data that EPA may find relevant.

C. Step Three: Implementation of Plans to Attain the New NAAQS

While EPA establishes the NAAQS and designates each county as attainment, nonattainment or unclassifiable, Congress assigned to states the primary responsibility to implement the NAAQS, which is Step Three of the NAAQS process. 42 U.S.C. §§ 7407(a), 7410, 7502. States fulfill this

responsibility primarily through developing State Implementation Plans ("SIPs"). *Id.* §§ 7410, 7502. All state SIPs must contain measures to "implement[], maintain[], and enforce[]" the NAAQS within its jurisdiction, and to meet other requirements, such as prohibiting "significant contribut[ions] to nonattainment" and "interfere[nce] with maintenance" of the NAAQS in other states. *Id.* § 7410(a)(1), (a)(2)(D)(i)(I). States with areas designated nonattainment have additional planning requirements. *Id.* §§ 7502(c), 7511a.

After adopting a SIP a state will submit it to EPA. *Id.* § 7410(a). EPA must approve the SIP if it meets the Act's requirements. *Id.* § 7410(k)(3); *Union Elec. Co. v. EPA*, 427 U.S. 246, 251 (1976) ("Each State is given wide discretion in formulating its plan, and the Act provides that the Administrator 'shall approve' the proposed plan" if it meets the criteria specified in the statute.). Thus, consistent with requirements specified in the Act, it is the states that have primary responsibility for implementation of the measures required to bring nonattainment areas within their jurisdiction into attainment.

III. REGULATORY BACKGROUND

A. Development of the 2015 Ozone NAAQS

As outlined above, pursuant to 42 U.S.C. § 7409, EPA is to periodically review and, as appropriate, revise the NAAQS for ozone and other covered pollutants. EPA did just that for the ozone NAAQS in 1979, 1997, and 2008. 44

Fed. Reg. 8202 (Feb. 8, 1979); 62 Fed. Reg. 38,856 (July 18, 1997); 73 Fed. Reg. 16,436 (March 27, 2008) ("2008 Designation Rule"). Pursuant to that periodic duty, EPA most recently revised the NAAQS in 2015, when it lowered the level of the primary and secondary 8-hour ozone NAAQS to 70 ppb. 80 Fed. Reg. 65,292 (Oct. 26, 2015).

B. The Area Designations at Issue

Pursuant to the process established under the CAA for Step Two area designations, on September 30, 2016, Texas submitted to EPA its initial designations for all counties in Texas. This included the eight counties that comprise the San Antonio area. C.I. 0046.[4] Texas explained that its recommendations were based on the most recent certified monitoring data available, which was from the years 2013-2015. *Id.* at B-1.[5] Based on the fact that two ozone monitors in Bexar County had design values above 70 ppb and thus exceeded the NAAQS, Texas recommended a designation of nonattainment for

[4] For purposes of determining the appropriate boundary for the San Antonio Area, EPA considered the 8 counties in the San Antonio-New Braunfels CBSA.

[5] All recommended designations submitted by Texas included a proviso that the 2015 70 ppb ozone NAAQS that EPA established in Step One was being challenged in the D.C. Circuit Court of Appeals. Oral argument was held in that case on December 18, 2018. *Murray Energy Corp. et al. v. EPA*, Case No. 15-1385.

Bexar County. Texas recommended that the other seven counties in the San Antonio area be designated attainment. *Id.* at A-1, B-1.

Almost a year later, on August 23, 2017, Texas sought to amend several of its initial recommendations to EPA. C.I. 0216. Once again basing its recommendations on monitoring data (this time using updated certified monitoring data from 2014-16), Texas revised its recommendation for two counties in the Houston and El Paso areas. *Id.* Texas made no mention of Bexar County in this correspondence.

Notwithstanding its prior nonattainment recommendation, on September 27, 2017, Texas wrote to EPA, urging it to allow the State more time to show that additional data or considerations might be relevant to the designations for the counties in the San Antonio area, including Bexar County. C.I. 0214 at 2. Pursuant to this request, EPA did not immediately send notification to Texas of intended designations for the 8-county San Antonio area. On January 19, 2018, EPA directed Texas to submit its contemplated additional data by February 28, 2018. C.I. 0436.

On February 28, 2018, Texas submitted a letter (with attached report) to EPA, departing from its earlier recommendation that Bexar County be designated nonattainment. C.I. 0297. Texas did not dispute the monitoring data for Bexar County. Nor did Texas assert that Bexar County had come into attainment with the

70 ppb NAAQS since its original recommended nonattainment designation. Instead, based on photochemical source apportionment modeling ("source apportionment modeling") that had been conducted by the Alamo Area Council of Governments ("Alamo Council"), Texas asserted that "Bexar County is projected to meet the 2015 NAAQS by 2020," and on that basis recommended it be deemed attainment.

EPA disagreed with Texas's revised recommendation as to Bexar County. On March 19, 2018, EPA wrote to the State explaining that it had 120 days to respond to EPA's determination that it intended to modify Texas's revised recommended designation for Bexar County. C.I. 0313. Included with the letter was EPA's 24-page document entitled "Intended Area Designations" setting out EPA's analysis and findings for all counties in the San Antonio area. C.I. 0314. EPA also called for public comment on EPA's intended area designations for the entire 8-county San Antonio area. 83 Fed. Reg. 13,719 (March 30, 2018).

EPA thereafter considered additional comments submitted by Texas (C.I. 0364), as well as those from Sierra Club (C.I. 0356), Intervenor Environmental Defense Fund ("EDF") (C.I. 0357) and others and, on July 25, 2018, issued the final designations for the eight counties comprising the San Antonio area. 83 Fed. Reg. 35,136 (July 25, 2018) ("Final Designation"). Specifically, EPA determined that Bexar County was in nonattainment with the 70 ppb NAAQS based on the

undisputed monitoring data. To make this designation EPA used the most up-to-date quality-assured monitoring data, which now included certified monitoring data for 2015-2017. 83 Fed. Reg. at 35,139. As reflected in that data, Bexar County still was in nonattainment based on the average of ozone values measured over 2015-2017.

EPA further determined that: (a) none of the other seven counties in the San Antonio area had air quality monitors meeting EPA regulatory requirements and thus there was no evidence those counties were violating the NAAQS; and (b) the data did not support a conclusion that any of those seven counties were sufficiently contributing to air quality at the violating monitors in Bexar County. EPA thus designated these counties attainment/unclassifiable. *Id.* In support if its findings on all eight counties in the San Antonio area, EPA issued its Final Area Designations Technical Support Document ("TSD"), C.I. 0428, and its Response to Comments ("RTC"), C.I. 0427, which describe the analysis performed by EPA in reaching the Final Designation. [6]

[6] Texas asserts that EPA is "required by 42 U.S.C. § 7607(d)(6)(b)" to respond to its comments. Texas Br. 12. Similarly, Sierra Club implies that EPA failed to adequately respond to some of its comments. However, the procedural requirements of 42 U.S.C. § 7607(d) only apply to the particular actions listed in § 7607(d)(1), and to "such other actions as the Administrator may determine." Designations are not listed under §7607(d)(1), and EPA did not make a determination that designations for the 2015 ozone NAAQSs would be subject to the procedure in §7607(d). Thus, as the title of the RTC (C.I. 0427) indicates, it provides "Responses to *Significant* Comments." (Emphasis added).

SUMMARY OF ARGUMENT

Sierra Club challenges venue in this Court, asserting that this case should be heard in the D.C. Circuit. However, both this Court and the D.C. Circuit already have found venue to be proper in this Court. This is the law of the case and Sierra Club may not revisit this issue one more time.

Even if the Court were to revisit this issue, Sierra Club's assertion that venue is not proper here is without merit. Under the venue provision of the Clean Air Act, an EPA action "which is locally or regionally applicable" may be filed "*only* in the United States Court of Appeals" covering that area, 42 U.S.C. § 7607(b)(1) (emphasis added). The only exception to that mandate (where the Administrator expressly finds that the locally or regionally applicable action is based on a determination of nationwide scope and effect), has not been invoked by EPA in a published finding, which is an express statutory requirement for application of this venue exception. EPA's non-exercise of this discretion is not reviewable under the arbitrary and capricious rubric, and even it was, it was not unreasonable for EPA to refrain from invoking that exception here.

Turning to the merits, Texas spends considerable effort to avoid one immutable and uncontroverted fact: that Bexar County was, at the time the Final Designation was issued (July 25, 2018), in nonattainment with the 2015 70 ppb ozone NAAQS. Instead, Texas asserts that EPA must base its determination of

attainment or nonattainment on predictions of future compliance with the NAAQS, not on monitoring data reflecting actual ozone levels. But Texas's view is wholly unsupported by the CAA generally and the specific statutory provision at issue, 42 U.S.C. § 7407(d). The efforts Texas goes to in order to seek to avoid the clear mandate of the CAA are considerable.

Texas first asserts that it is the state that decides whether its counties are in attainment, seeking to minimize EPA's role in this determination. But the express language of the statute and Texas's own statements issued in conjunction with the 2015 ozone NAAQS declare otherwise. Neither does Texas's appeal to the principles of "cooperative federalism" underlying the CAA override Congress's express directives.

Texas next insists that EPA may only modify the state's recommendations regarding designations when it is "necessary" to do so, and then supplies its own definition of when it is, in fact, "necessary." But again, Texas cannot circumvent the express requirements of the CAA by setting up a new standard for EPA to modify a state's recommendation and then acting as the arbiter of EPA's modification decisions. Ultimately, it was clearly "necessary" for EPA to modify Texas's revised designation of attainment for Bexar County because the recommended designation was unsupportable under both the law and the facts.

42 U.S.C. § 7407(d)(1)(A)(i) unambiguously declares that an area is to be designated "nonattainment" if it "does not meet . . . the national primary or secondary ambient air quality standard [NAAQS] for the pollutant." Texas asserts that this language actually means that an area should be designated nonattainment only if it will fail to meet NAAQS within *three years*. While Congress could have included in the statute this or similar language, it did not do so. To the contrary, Congress expressly created a specific classification of nonattainment designations for the ozone NAAQS known as "Marginal nonattainment" to address those areas that are in nonattainment but expect to be in attainment within *three years*. Quite simply, the Act cannot be read to authorize a designation of attainment for a county that is violating the NAAQS at the time of the designation but may come into attainment within three years, when the statute classifies exactly these types of counties as "Marginal *nonattainment*." Indeed, Texas's interpretation would read the marginal nonattainment classification out of the statute.

In the face of these clear Congressional directives, Texas attempts for the first time in its brief to argue that the Dictionary Act (1 U.S.C. § 1), overrides the requirements of the CAA. But Texas never asserted in its numerous submissions to EPA that the Dictionary Act required EPA to consider future predicted attainment of the NAAQS in making its designations. Under what the courts describe as black-letter administrative law, Texas's failure to raise its Dictionary

Act argument during the administrative process waives such claim. Separately, the Dictionary Act is not applied where the context of the underling Act "indicates otherwise." Here, the context of the CAA establishes that Congress has expressly spoken as to temporal requirements, and thus the Dictionary Act has no application. Finally, even if the Dictionary Act were to be considered, it actually would require Texas to establish that Bexar County is in attainment in the present and also will be in attainment in the future, not either/or.

Through the cooperative SIP process, where states take the lead and EPA must approve the state plan for achieving the NAAQS so long as it complies with the requisite conditions, Texas may propose procedures that will minimize the actions required for Bexar County to reach attainment, so long as they are consistent with the requirements of the Act. Texas could, for instance, propose actions already planned that the state presently contends will cause Bexar County to reach the 70 ppb requirement in the foreseeable future. Texas may not, however, rewrite the statute based on such hopes and predictions in an effort to avoid having Bexar County be designated as nonattainment.

Petitioner Sierra Club challenges EPA's designations of three counties bordering Bexar County as attainment. In Sierra Club's view, these counties contribute to the nonattainment of Bexar County. EPA applied its five-factor weight-of-the-evidence-test to assess whether any of these counties sufficiently

contribute to nonattainment in Bexar County. Under this test, EPA examined, *inter alia*, the location of sources in these counties (particularly in relation to the violating monitors in Bexar County), the absolute and relative populations of the counties, the numbers and patterns of commuters to Bexar County from the other three counties, predicted emissions of ozone precursors, modeling of wind and air flow relative to the violating monitors, and a host of other factors. Sierra Club does not assert that EPA failed to apply all relevant factors but instead, through cherry-picking findings, disagrees with EPA's conclusions. It is fundamental administrative law that an agency's factual determination – particularly a highly technical one such as this – cannot be overturned as arbitrary and capricious unless it is not a product of reasoned decision-making. Sierra Club fails to make that showing here.

Alternatively, Sierra Club contends that EPA misapplied the definition of "contribution," arguing that EPA should have applied a single, bright-line numerical threshold to determine when a county's emissions contribute sufficiently to a nearby nonattainment county so as to designate that county nonattainment based on that contribution. But there is no such threshold in the provision at issue, 42 U.S.C. § 7407. Instead, Sierra Club cites to a different statutory provision that deals with assessing long-range air quality influences from state-to-state, and attempts to bootstrap it into the Designation provision (and gets its math wrong in

doing so). That standard has no application here, either legally or factually. Courts have consistently recognized that EPA is not required to apply this or any other bright-line test in making designations. Those courts also have consistently upheld EPA's use of its well-accepted, case-by-case, five-part weight-of-the-evidence test to make contribution determinations, and there is no basis to do otherwise here.

It is understandable that the parties may view the applicable standards and the data through a prism that is more reflective of their particular views or interests. Congress, however, conferred the responsibility for making attainment/nonattainment designations on EPA. Indeed, Petitioners acknowledge that Congress granted EPA extraordinarily broad authority and discretion to do so, recognizing the highly technical and specialized nature of these determinations. Here, EPA reasonably exercised that discretion based on the full weight of the evidence utilizing well-accepted and unchallenged criteria, and fulfilled its statutory responsibility in a manner wholly consistent with both Congress's express directives and the approach that EPA has historically applied throughout the country when promulgating designations for ozone NAAQS.

STANDARD OF REVIEW

"A NAAQS designation by the EPA [may be set aside] only if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with

law.'" *Mississippi Comm'n*, 790 F.3d at 150, quoting *Catawba County*, 571 F.3d at 41 and 5 U.S.C. § 706(2)(A). In interpreting statutory terms to determine whether EPA acted in accordance with law, the Court first inquires whether Congress "has directly spoken to the precise question at issue," in which case the Court "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984). If the statute is "silent or ambiguous with respect to the specific issue," the Court moves to *Chevron's* second step and must defer to the agency's interpretation so long as it is "based on a permissible construction of the statute." *Id.* "If the agency's interpretation is reasonable, it will be upheld," even if the court might have come to a different judgment. *BCCA Appeal Group v. EPA*, 355 F.3d 817, 824-25 (5th Cir. 2003).

EPA's factual or technical conclusions are to be upheld unless arbitrary and capricious. "Review under the arbitrary-and-capricious standard is 'extremely limited and highly deferential,' *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 243 (5th Cir. 2015) [citations omitted], and 'there is a presumption that the agency's decision is valid. *La. Pub. Serv. Comm'n v. FERC*, 761 F.3d 540, 558 (5th Cir. 2014)." *Markle Interests, LLC v. U.S. Fish and Wildlife Service*, 827 F.3d 452, 459-60 (5th Cir. 2016). *See also Labs, Inc. v. Sebelius*, 612 F.3d 771, 775 (5th Cir. 2010).

ARGUMENT

I. VENUE PROPERLY LIES IN THIS COURT

A. The Issue of Venue Has Been Finally Decided and is the Law of the Case

On October 17, 2018, Texas filed a motion to confirm venue in this Court. Doc. 00514686638. One day later, on October 18, 2018, Sierra Club filed a motion asking this Court to hold this action in abeyance pending EPA's decision on Sierra Club's administrative petition for reconsideration. Doc. 00514688853. That administrative petition, which was submitted to the Court, contained a lengthy argument as to why, in Sierra Club's view, venue should lie in the D.C. Circuit. *Id.* at Ex. A.

This Court denied Sierra Club's motion to stay its decision pending any determination EPA might make on administrative reconsideration and granted Texas's motion "to confirm the venue for [the] petitions for review of the challenged action lies in the United States Court of Appeals, 5th Circuit, allowing *merits briefing* in this case to proceed." Oct. 26, 2018 Order, Doc. 00514699423 at 1-2 (emphasis added). That order is in stark contrast to one issued in *Texas v. EPA*, 706 Fed. Appx. 159, 161 (5th Cir. 2017) (cited at Sierra Club Br. p. 27, n.12), where the Court expressly invited further argument on the venue issue during merits briefing, issuing its ruling specifically "without prejudice to reconsideration by the merits panel."

"The law-of-the-case doctrine 'posits that when a court decides upon a rule of law, that decision should continue to govern the same issue in subsequent stages in the same case.'" *Medical Center Pharmacy v. Holder*, 634 F.3d 830, 834 (5th Cir. 2011), quoting *United States v. Castillo,* 179 F.3d 321, 326 (5th Cir. 1999) and *Arizona v. California*, 460 U.S. 605, 618 (1983). "Courts should be loathe ['to revisit prior decisions of its own or of a coordinate court'] in the absence of extraordinary circumstances, such as where the initial decision was 'clearly erroneous or would work a manifest injustice." *Christianson v. Cold Indus. Operating Corp.*, 486 U.S. 800, 815-17 (1988), quoting *Arizona*, 460 U.S. at 618, n.8.

This doctrine applies to a court's decisions on venue, and it also applies when that initial decision is made pursuant to a preliminary motion. *See, e.g., Hendricks & Lewis, PPLC v. Clinton*, 2012 WL 5949509 at *1 (W.D. Wash., November 27, 2012) ("Under the law-of-the-case doctrine, the Court will not revisit the venue issue."); *Marquis Who's Who, Inc. v. North American Advertising Associates, Inc.*, 426 F. Supp. 139, 142, n.2 (D.D.C. 1976) (the court's earlier rulings on motions challenging jurisdiction and venue "have become the law of the case and are binding on all parties."); *In re EquiMed, Inc.*, 253 B.R. 391, 396 (D. Md. 2000) (court's decision denying motion for lack of venue "represented the law

of the case" and precluded relitigating that issue at subsequent stages of the litigation).

Importantly, the determination that venue lies in this Court also was decided by the D.C. Circuit. There, Texas filed a motion to transfer the case to this Court, based on venue. D.C. Doc. 1758743. Sierra Club filed a full opposition to Texas's motion to transfer. D.C. Doc. No. 1759093. Sierra Club also filed a motion to stay the D.C. Circuit case to allow EPA time to reconsider issues that might affect venue. D.C. Doc. No. 00514688853 at 3. On December 28, 2018, the D.C. Circuit granted Texas's motion and transferred the case to this Court, which has since been consolidated with this action. D.C. Cir. Doc. No. 1766298.

The law-of-the-case doctrine applies equally to the decision of the D.C. Circuit to transfer Sierra Club's challenge to the Final Designation to this Court:

> Certainly, the decision of a transferor court should not be reviewed again by the transferee court. *Starnes v. McGuire,* 512 F.2d 918, 924 (D.C.Cir.1974) (*en banc*). Such an independent review would implicate those concerns which underlie the rule of repose and decisional order we term the law of the case. We have said: "If the motion to transfer is granted and the case is transferred to another district, the transferee-district should accept the ruling on the transfer as the law of the case and should not re-transfer 'except under the most impelling and unusual circumstances' or if the transfer order is 'manifestly erroneous.'" *United States v. Koenig,* 290 F.2d 166, 173 n. 11 (5th Cir.1961), *aff'd,* 396 U.S. 121 (1962).

In re Cragar Industries, Inc., 706 F.2d 503, 505 (5th Cir. 1983). *See also Walker v. Beaumont Independent School District*, No. 1:15-cv-379, 2015 WL 12815130 at *2

(E.D. Texas, Dec. 8, 2015) ("Policies supporting the law of the case doctrine apply with 'even greater force to transfer decisions than to decisions of substantive law' because 'transferee courts that feel entirely free to revisit transfer decisions of a coordinate court threaten to send litigants into a vicious circle of litigation.'" *Quicksilver Res., Inc.*, No. H-08-868, 2008 WL 3165745, at *5-6 (quoting *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815-16, 819 (1988).").

Sierra Club may point to the fact that the D.C. Circuit did not discuss its analysis of venue in its order and instead just granted the motion to transfer, but that is of no consequence. As the Supreme Court explained, the fact that the transferor court (the D.C. Circuit) "did not explicate its rationale [for transferring the case] is irrelevant, for the law of the case turns on whether a court previously 'decided upon a rule of law' – which the [court] necessarily did – not on whether, or how well, it explained the decision." *Christianson*, 486 U.S. at 817. Similarly, the fact that this Court did not find it necessary to explain its reasoning in granting Texas's motion to confirm venue, does not alter the fact that it is the binding law of the case.

Sierra Club offers no extraordinary circumstances, no new evidence, and no glaring mistake made by the D.C. Circuit or by this Court that would warrant this Court going against the law-of-the-case on venue already decided by both Courts. To the contrary, Sierra Club merely asserts in a footnote that this Court's earlier

venue decision is not binding. Sierra Club Br. 27, n.12. No matter how strongly Sierra Club believes in its argument, the law-of-the-case doctrine prevents it from taking a third bite at the same apple.

B. This Court Correctly Ruled that Venue Lies in this Court

1. EPA Did Not Invoke Its Right to Find that the Exception to the Statutory Venue Provision Should be Applied

Even if the Court *were* to revisit the venue issue, its prior determination that it has venue should stand. The petitions for review filed by both Texas and Sierra Club were brought under 42 U.S.C. § 7607(b)(1). Under that provision, except in limited circumstances not invoked by EPA here (*see* discussion *infra*), a petition for review of an EPA action "which is locally or regionally applicable" may be filed "*only* in the United States Court of Appeals for the appropriate circuit," which in this case is the Fifth Circuit. *Id.* (Emphasis added). Conversely, a challenge to a "nationally applicable regulation[] promulgated or final agency action taken by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia." *Id.*

Despite Petitioners' attempts to frame them to the contrary, these provisions do not turn on what the administrative action taken was "based on," but rather on where the challenged administrative action is "applicable." *Id. See also Texas v. EPA*, 829 F.3d 405, 419 (5th Cir. 2016); *Texas v. EPA*, 706 Fed. Appx. at 163.

There can be no doubt that the Final Designation being challenged is "locally or regionally applicable" and is not "nationally applicable." The record-based decision has no legal applicability whatsoever beyond the eight Texas counties that are the subject of the Final Designation being challenged. No person or entity in Los Angeles County, California, or Cook County, Illinois, or Dallas County, Texas, for that matter, can claim that the Final Designation at issue here has any regulatory application within their jurisdictions. As this Court stated in a recent similar venue dispute regarding NAAQS designations, "[w]e are not aware of any case holding that a rule that on its face regulates entities and conduct in a single state is nationally applicable." *Texas v. EPA*, 706 Fed. Appx. at 164.[7]

There is one exception to the clear local/national division of venue set forth in the statute. The D.C. Circuit is the appropriate venue to challenge a locally or regionally applicable EPA action "if such action is based on a determination of nationwide scope or effect *and* if in taking such action the Administrator *finds and publishes* that such action is based on such a determination." 42 U.S.C.

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[7] Sierra Club cites to *ATK Launch Systems, Inc., v. EPA*, 651 F.3d 1194 (10th Cir. 2011), where the court transferred a NAAQS designation challenge by a Utah company to the D.C. Circuit. Sierra Club Br. 27. While the petitioner Utah company was concerned only with the designation of a county in Utah, the actual rule being challenged included designations for areas throughout the United States. *Id.* at 1197. Here, the rule being challenged includes only designations for an 8-county area in Texas.

§ 7607(b)(1) (emphasis added) ("venue exception"). This exception has two explicit conjunctive requirements and, as Sierra Club itself recites, it is "one of the most basic interpretative canons, that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void, or insignificant." Sierra Club Br. 30, quoting *Exelon Wind 1, LLC v. Nelson*, 766 F.3d 380, 399 (5th Cir. 2014).

In this case neither aspect of the second requirement of the venue exception was satisfied, as the Administrator made no finding that the Final Designation is based on a determination of nationwide scope and effect and certainly did not publish such a finding. Instead, EPA expressly stated in the Final Designation, under the heading of "Judicial Review," that under 42 U.S.C. § 7607(b)(1), "petitions for judicial review of this action must be filed in the U.S. Court of Appeals for the appropriate circuit . . . ." 83 Fed. Reg. at 35,140/3.[8] Absent an express statement – and publication – that the Administrator was making such a finding and thus invoking the venue exception, there can be no application of that exception. *See, e.g., Lion Oil v. EPA*, 792 F.3d 978, 984, n.1 (8th Cir. 2015) (even

[8] Sierra Club claims that EPA failed to indicate "EPA's view on the proper venue for judicial challenges" of the San Antonio designations because EPA stated that "judicial review is available 'in the U.S. Court of Appeals for the appropriate circuit.'" Sierra Club Br. 16. This is the wording used in the statute to identify venue *other than* the D.C. Circuit (unless the local action applies specifically to the District of Columbia).

where EPA, unlike here, made the necessary finding, the court found no need to decide application of the venue exception absent publication of that finding).

Sierra Club cannot circumvent the express wording of the statute through the back door by arguing that the Administrator arbitrarily determined not to exercise his discretion to invoke the venue exception. Sierra Club Br. 34-36. As Sierra Club explains, the standard of review for an arbitrary and capricious claim under the CAA is governed by the Administrative Procedure Act, specifically 5 U.S.C. § 706. Sierra Club Br. 20. That provision, which embodies the arbitrary and capricious standard, expressly does not apply that review standard to "an agency action that is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Under that statute, a court may not compel agency action "whenever the agency is withholding or delaying an action we think it should take. Instead, our ability to 'compel agency action' is carefully circumscribed to situations where an agency has ignored a specific legislative command," i.e., a mandatory, non-discretionary duty. *Hells Canyon Preservation Council v. U.S. Forest Service*, 593 F.3d 923, 932 (9th Cir. 2010), *citing Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 63-64 (2004).

One would be hard-pressed to find a statute more lacking in a specific legislative command and that, instead, more expressly hands to the Administrator full discretion to make his/her own determination of whether to apply an exception

to a Congressionally-dictated rule. *See Texas v. EPA*, 829 F.3d at 419-20 (the venue exception "gives the Administrator the *discretion* to move venue to the D.C. Circuit by publishing a finding declaring the *Administrator's belief* that the action is based on a determination of nationwide scope and effect.") (Emphasis added).

Sierra Club's argument that the Administrator's non-action is subject to review as being arbitrary is nothing more than a claim that the Administrator failed to perform a "mandatory duty," dressed up as an arbitrary and capricious claim. There are a number of provisions of the CAA that require the Administrator to take a non-discretionary action and, if he fails to do so, a party may file an action to require him to act. *See, e.g.*, *Coalition for Responsible Regulation v. EPA*, 684 F. 3d 102, 126-27 (D.C. Cir. 2012). But that is not the case here, where Sierra Club is seeking review of the Administrator's action in refraining from taking a discretionary step of finding and publishing that this action was based on a determination of nationwide scope and effect.

Any citation to courts reviewing a decision by the Administrator to affirmatively invoke the venue exception, where the Administrator would presumably describe the basis for invoking the exception, would be inapposite. EPA asserts here only that a party may not challenge the inaction of the Administrator to take a wholly discretionary act, through the back door of an arbitrary and capricious claim. Sierra Club's attempt to insert an "arbitrariness"

standard into the statute is wholly antithetical to Congress's directive to allow the Administrator to determine when an exception to the regular venue provision is warranted, and as such it does not create a basis for challenging the non-exercise of discretion.

2. The Administrator's Determination Not to Invoke the Venue Exception Was Not Arbitrary and Capricious

Because there is no basis to require EPA to memorialize in an administrative record the Administrator's non-exercise of a wholly discretionary option (a non-action), there is no specific discussion of this issue in the record. To the extent the Court determines that the Administrator is required to explain his non-action, he should be given the opportunity to do so through the administrative process. However, here, that is wholly unnecessary.

Even if one *were* to do an assessment of the Administrator's non-action, it is hardly arbitrary and capricious for the Administrator to refrain from making a finding here that the challenged action is "based on a determination of nationwide scope or effect." Sierra Club argues that because the San Antonio area designations were based on the same statutory and regulatory requirements as are applied in every area of the country, those designations are "based on a determination of nationwide scope or effect." Sierra Club Br. 34-36. This, however, is an overly simplistic view, divorced from any real analysis – and contradictory to the localized arguments that Sierra Club makes in the substantive

sections of its brief. Virtually every local determination made by EPA (and most federal agencies) will derive, in some sense, from the application of federal statutes and regulatory or other policy requirements or guidelines that apply throughout the country. While Sierra Club is correct that different circuit courts might apply the same statutory or regulatory requirement in a different manner in given circumstances, that is true with regard to the application of virtually every federal law or regulatory requirement. If this were a basis for *requiring* the Administrator to invoke the venue exception, all challenges to NAAQS designations would be heard in the D.C. Circuit. But that is not the case, as evidenced by cases heard by this Court and others. *See, e.g., Texas v. EPA*, 706 Fed. Appx. 159 (5th Cir. 2017).

Nor does it matter that the Final Designation at issue was separated from other final actions involving designations that are being challenged in a consolidated case in the D.C. Circuit. Sierra Club attempts to attribute some sinister motive to EPA, asserting that it "has given Texas special treatment," Sierra Club Br. 17. In fact, all EPA did was grant Texas's request for additional time so that it might gather and present additional data that could affect the State's original proposed designations. The fact that this caused the San Antonio designations to be separated from other designations is just that, a fact, not a strategy.[9]

[9] Sierra Club points out that the documents supporting the Final Designation are combined with the record supporting separate final actions involving designations in other parts of the country. EPA collected all comments, separate analyses, and

Instead, any question as to whether the Administrator properly exercised his discretion in choosing not to invoke the venue exception must, under the wording of the statute, turn on what the challenged action (the Final Designation) was "based on." 42 U.S.C. § 7607(b). In assessing what an EPA final action "'is based on,' the relevant determinations are those that lie at the core of the agency action … [and] can be found in the agency's explanation of its action. They are the reasons the agency takes the action it does." *Texas v. EPA*, 829 F.3d at 419. As this Court explained when reviewing whether the invocation of the exception was reasonable, "[d]eterminations are not of nationwide scope or effect if they are 'intensely factual determinations' such as those 'related to the particularities of the emissions sources in Texas.'" *Texas v. EPA*, 706 Fed. Appx. 159 at 165.

Here, as reflected in both the briefs and comments of all parties as well as EPA's decision documents, the Final Designation at issue was "based on" data from two monitors in Bexar County and other data relating to *local* wind dispersion, meteorology, traffic, population patterns, locations of stationary sources of emissions, etc. 83 Fed. Reg. at 35,138/3-39; C.I. 0428, 0427 (TSD,

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other record documents for all of the designations in a single docket location, but the vast majority of those documents were not considered in any way in the decisionmaking on, and thus have no relevance whatsoever to, the Final Designation at issue here. As such, one should not read legal significance into the administrative task of compiling a rulemaking docket for related but separate designations actions.

RTC). *See also* Sections II and III, *infra*. Accordingly, the Administrator did not act arbitrarily in refraining from exercising his discretion to invoke the venue exception, and hence venue properly lies in this Court.

II. EPA PROPERLY DESIGNATED BEXAR COUNTY AS NONATTAINMENT

The statute defines a nonattainment area as "any area that does not meet (or that contributes to ambient air quality in a nearby area that does not meet) the [NAAQS]." 42 U.S.C. § 7407(d)(1)(A)(i). Texas does not dispute that at the time it made its original *and* revised recommendations, at the time EPA made its Final Designation as published in the Federal Register, and even today, Bexar County "does not meet" the 70 ppb NAAQS for ozone.

To attempt to elude this undeniable fact, Texas argues that the statute does not mean what it says. Although Texas concedes that the statute is written in the present tense (Texas Br. 16), it argues that Texas (and EPA) nevertheless have license to set aside certified monitoring data establishing present violation of the NAAQS. Texas asserts it may instead establish attainment based on predictions that Bexar County will achieve attainment in the future. But neither the Dictionary Act nor principles of cooperative federalism can alter the unambiguous requirements and mandate of the CAA.

A. EPA's Determination to Base Area Designations on Air Quality Monitoring is Both Consistent with the Statute and Reasonable

Texas does not dispute that, based on certified and quality-assured data collected by Texas, two of the three monitors in Bexar County are violating the 70 ppb ozone NAAQS based on the most recent three consecutive years for which air quality monitoring data is available. Texas makes no claim that the monitors were faulty or that the data was inaccurate. Instead, Texas asserts that EPA can – and should – base attainment designations on whether emissions modeling predicts that the subject county will be in attainment at some time in the future.

Air quality *monitoring* is different than air emissions *modeling* of projected and future emissions, which is what Texas relies on for its predictions of future attainment. As applied to this case, air quality monitoring involves measuring the actual existing level of ambient ozone based on certified monitoring devices. In contrast, air emissions modeling involves making predictions of the future levels of emissions of precursors to ozone (NOx and VOCs) and then further predicting the level of ozone that will result from those projected emissions miles away at downwind sites after experiencing the sun-driven chemical reactions required to form ozone.

As outlined *supra*, Congress directed EPA to require air quality monitoring for all major metropolitan areas. 42 U.S.C. § 7619. EPA did exactly that and promulgated rigorous standards to ensure such monitoring data was accurate. 40

C.F.R. pt. 58. EPA then explained in regulations promulgated specifically for the 2015 NAAQS that the "primary and secondary national ambient air quality standards for O_3 [ozone] are met at an ambient air quality monitoring site when the 3-year average of the annual fourth-highest maximum 8-hour average O_3 concentration (i.e., design value) is less than or equal to 0.070 ppm [70 ppb]." 40 C.F.R. Pt. 50.19, Appx. U, ¶ (4)(a). Conversely, if the same monitoring data shows exceedance of the 70 ppb NAAQS, the area is not meeting the NAAQS. *Id.* ¶ 4(c) (Example 2). EPA further specified in the 2015 Designation Guidance that the design values derived from monitoring (where available) form the basis for area designations. C.I. 0061 at 3-5. *See also* Texas Br. 12-13.

Congress's emphasis on utilizing reliable monitoring data where it is available to promulgate area designations is reflected in more than the general monitoring requirements EPA established under 42 U.S.C. § 7619. It is, in fact, reflected throughout the NAAQS program for criteria pollutants, including ozone.

For instance, in establishing designation requirements for particulate matter ("PM") to be promulgated by specific dates, Congress declared that "any area containing a site for which *air quality monitoring data* show a violation of the [NAAQS] for [particulate matter] before January 1, 1989 . . . is hereby designated nonattainment." 42 U.S.C. § 7407(d)(4)(B)(ii) (emphasis added). *See also* 42 U.S.C. § 7407(d)(6)(A), calling upon states to submit area designations "based on

air quality monitoring data collected in accordance with any applicable Federal reference methods for the relevant areas." *Id.* (emphasis added).[10] As to ozone specifically, Congress acknowledged and gave its imprimatur to EPA's use of monitoring data in ozone designations and classification through the enactment of 42 U.S.C. § 7511(a)(1), which required classification of 1989 ozone nonattainment areas based on design values that are generated from monitoring data.[11]

The view that EPA should rely on regulatory monitoring data to make designations is further reflected in the government's most recent proclamations. In

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[10] Texas asserts that these provisions governing particulate matter (PM) reflect that Congress could have chosen to direct that ozone designations be based on air quality monitoring data but chose not to. Texas Br. 27. That argument ignores that fact that those PM provisions were added to the CAA in 1990 and 2004, respectively, when EPA already had a functioning monitoring network for ozone (and used data from that network in designations) but did not yet have one for PM10, the form of the particulate matter standard at the time of the 1990 Clean Air Act Amendments, or for the new PM2.5 NAAQS, promulgated in 1997. *Compare* 44 Fed. Reg. 8202 (Feb. 8 1979) (describing how to apply monitoring data to determine nonattainment in the 1979 Ozone NAAQS final rule), with 42 U.S.C. § 7407 note (citing Pub. L. No. 105-178 § 6101) (Congress finding that there is a "lack of quality air monitoring data for fine particulate levels [PM2.5]"). As such, Congress did not need to amend the Act to require that EPA base ozone designations on air quality monitoring data, because EPA already was doing so.

[11] Designations are determinations regarding current air quality, which are made based on the information before the Agency at that time. *See* 42 U.S.C. § 7407(d)(1). While EPA has typically relied on modeling data for SO_2 because of the particularities of that pollutant, s*ee, e.g.,* 43 Fed. Reg. 8962 (Mar. 3, 1978) (final designations for the 1971 SO2 NAAQS), even for SO_2 EPA only relies on modeling for designations that are representative of *current* air quality. *See* 81 Fed. Reg. 45,039 (July 12, 2016).

Presidential Memorandum to EPA Administrator, April 12, 2018 (available at https://www.whitehouse.gov/presidential-actions/presidential-memorandum-administrator-environmental-protection-agency), the President directs EPA, "to the extent feasible and permitted by law, to rely on data from EPA-approved air quality monitors for [making] such designations." *Id.* at § 5(a). It is undeniably feasible for EPA to promulgate its designation of Bexar County based on monitoring data and as outlined herein EPA is certainly permitted by law to do so.

Two of the three monitors in Bexar County have a design value above the 70 ppb NAAQS based on the most recent three consecutive years for which there was certified data, 2015-17. On this basis, EPA designated Bexar County nonattainment, consistent with its regulations and its 2015 Guidance. Texas admits that this nonattainment designation reflects the approach EPA announced it would follow in the 2015 Guidance, which states that EPA "*must* designate an area nonattainment if [the area] has an air quality monitor that *is* violating the standard." Texas Br. 12 (emphasis added). It is also consistent with EPA's regulations.[12] Until now, Texas has never challenged the approach set forth in EPA's regulations and/or the 2015 Guidance (or the 2008 Guidance and its long-

[12] EPA's specific data-handling requirements to determine whether air quality at a specific monitor is meeting the 2015 NAAQS are laid out in 40 C.F.R. Part 50, Appendix U, which was published in the Federal Register along with the 2015 NAAQS. 80 Fed. Reg. 65,458 (Oct. 26, 2015).

held practices). To the contrary, Texas's original recommendation was to designate Bexar County as nonattainment based on the monitoring data. *See* pp. 15-16 *supra*. Indeed, in support of its statement describing Bexar County's past efforts to seek to achieve the NAAQS, Texas cites to the monitoring data. Texas Br. 9 (explaining "that, between 2004 and 2017, ozone design values as recorded at three San Antonio monitors fell from 79 ppb to 65 ppb, from 89 ppb to 73 ppb, and from 91 ppb to 74 ppb.").

Texas cites to no case that has ever held that EPA may not rely exclusively on data from regulatory monitors to designate an area as nonattainment for the ozone NAAQS. To the contrary, courts have recognized that this is precisely the evaluation process that EPA is to use. As explained in *Mississippi Comm'n*, 790 F.3d at 158-59, "if a single monitor from the area showed a NAAQS violation, the county housing the violating monitor would be designated nonattainment." *See also id* at 160: "At the first step of the process, a single violating monitor suffices to conclude the analysis and move to the second step [the contribution analysis from other counties]."

Texas asserts that while EPA is not necessarily required to consider projections of future air quality in making attainment designations, the statute provides EPA with discretion to consider more than monitoring data in making its determination. Texas Br. 30. To the extent that is accurate, EPA already exercised

that discretion. As noted, EPA's determination that monitored design values of ozone above 70 ppb constitutes nonattainment is set out in the 2015 Guidance and at 40 C.F.R. Pt. 50, Appendix U, which was published in the Federal Register in 2015. 80 Fed. Reg. 65,458 (Oct. 26, 2015). Texas never challenged this regulatory determination and it has no basis to do so here. Texas's attempt to contort clear statutory requirements to require EPA to ignore certified air quality data unequivocally establishing present nonattainment, and instead base its area designation on predictions of future attainment, is unsupportable.

B. Congress Directed EPA, Not States, to Promulgate Final Attainment/Nonattainment Designations

Recognizing that EPA bases designations on certified monitoring data where a regulatory monitor is present in a county, Texas asserts that it, not EPA, should determine how to adjudge whether Texas counties are in attainment. Texas argues that EPA oversteps its bounds when it makes designations based on monitoring, asserting that the State's submission is not a "recommendation" but rather a designation that is binding and which EPA can modify only in extremely limited circumstances. The express wording of the statute says otherwise.

The provision at issue in this case is titled "Promulgation by EPA of designations." It says in the first sentence that "the *Administrator* shall promulgate the designations of all areas or portions thereof submitted under paragraph (A)." 42 U.S.C. § 7407(d)(1)(B) (emphasis added). In contrast, subparagraph (A) is

titled: "Submission by Governors of *initial* designations" and requires each state to submit its proposed designations to EPA no later than one year after promulgation of a revised NAAQS. *Id.* at § 7407(d)(1)(A) (emphasis added). The statute directs *EPA*, after notifying the state of contemplated modifications and giving it 120 days to submit comments or additional information, to make the designations of all areas for which a state submits an initial designation (and also for those where the state fails to make a submission).

As several courts have explained, there is nothing ambiguous about this division of authority under the statute:

> Each state must submit *recommended* "*initial* designations" to EPA . . . [and] EPA may either promulgate them as submitted or modify them as *it* "deems necessary," [and t]he Act *gives EPA discretion to change a state's recommended designation, to alter a state's proposed designation*, geographic area, or both. . . .

Mississippi Comm'n, 790 F.3d at 145-46, quoting *Catawba County*, 571 F.3d at 40 (emphasis added). *See also EPA v. EME Homer City Generation, LP*, 572 U.S. 489, 498 (2014) ("Once EPA settles on a NAAQS, the Act requires the *Agency* to designate 'nonattainment' areas, i.e., locations where the concentration of a regulated pollutant exceeds the NAAQS . . . .") (emphasis added).

Texas argues that "although judicial opinions, EPA documents, and even briefing submitted by States in other Clean Air Act cases sometimes describe the States' role under section 7407(d)(1)(A) as making mere 'recommendations' for

area designations [citation omitted], that description is contrary to statutory text, and this Court should expressly reject it." Texas Br. 20. While Texas's brief now asserts that EPA, other states, and the courts have wrongly interpreted the statute for decades, the named Petitioners in this case, Texas's Governor and the Texas Commission on Environmental Quality (TCEQ), did not take that position in their multiple designation-related submissions to EPA.

In submitting to EPA the designations for all counties in Texas, including the San Antonio area counties, Texas Governor Jim Abbott explained that these were Texas's "2015 ozone NAAQS designation *recommendations* with supporting information from Dr. Bryan W. Shaw, Chairman of TCEQ, on behalf of the State of Texas." C.I. 0046 at 1 (emphasis added). Texas's counsel now claims that the CAA has been misinterpreted, notwithstanding the Governor's September 30, 2016 letter which declares that the CAA "establishes a process for each governor to provide *recommendations* to the EPA regarding appropriate designations for the 2015 ozone NAAQS for their state." *Id.* at 2 (emphasis added). That submission recommended that EPA promulgate "nonattainment designations for *all* counties in Texas with regulatory monitors measuring over the 2015 ozone NAAQS of 70 ppb," and, based on such monitoring, it recommended that Bexar County be deemed nonattainment. *Id.* at 3 and Attachments A and B (emphasis added).

In its subsequent submissions to EPA reversing its original recommended designation for Bexar County, Texas made it abundantly clear how the designation process works under the statute. Citing 42 U.S.C. § 7407(d)(1)(B)(ii), the Governor explained that "the statute asks 'the Governor of each State' to make *initial recommendations* based on whether an area 'meets' or 'does not meet' the NAAQS. C.I. 0297 at 3 (emphasis added). *See also* C.I. 0216 (Aug. 23, 2017 letter) (submitting Texas's "updated state designation *recommendations* for the 2015 ozone . . . NAAQS."). Texas's present attempt in its brief to ignore the views of EPA, other states, the courts, and even its Governor, to now reconstruct the statute so as to transform a state's recommendation into a presumed final designation that EPA may modify only under extreme circumstances (or not at all), simply has no support in the actual wording of the statute.

In the face of the express language of the specific statutory provisions at issue, Texas pursues a different approach to altering the statutory responsibilities of each entity. Eschewing specific statutory commands, Texas falls back on overly generalized characterizations of cooperative federalism. Texas argues that EPA somehow violates this concept by rejecting Texas's revised recommendation for Bexar County. Texas Br. 3, 21-22. The CAA certainly reflects Congress's decision to employ cooperative federalism in addressing certain aspects of air

pollution control. This concept, however, does not grant states the authority to make judgments that Congress delegated to EPA in the plain text of the Act.

As outlined above, Congress chose to give states considerable responsibility in the NAAQS process at Step Three, the implementation stage. It is at that stage that the state is to develop a SIP. So long as the SIP meets the minimum statutory requirements, States have discretion to determine the mix of controls necessary to attain the standard and/or to seek regulatory relief for which they qualify. *See Train v. Natural Res. Defense Council*, 421 U.S. 60, 79 (1975); *Union Elec.*, 427 U.S. at 269. That mix can potentially include factoring expected "ozone trends" into the implementation plan, so long as the statutory requirements are met. 83 Fed. Reg. at 35,137/1-2.

Such presumed trends do not, however, alter the designation process that occurs at Step Two. While states have an important role in making initial designations, Congress specifically granted EPA the broad authority to actually "promulgate designations" for every single county in the United States. As the courts have explained, "*EPA* has ultimate authority to determine *each area's attainment status* [while] each *state* has 'primary responsibility' for ensuring that the geographic areas within its borders maintain attainment or progress towards it, . . . [which states do through] submiss[ion] to the EPA [of] a State Implementation Plan (SIP) specifying how the NAAQS 'will be achieved and maintained.'").

Mississippi Comm'n, 790 F.3d at 146 (emphasis added). *See also Texas v. EPA*, 829 F.3d at 411; *Luminant Generation Co. v. EPA*, 675 F.3d 917, 921 (5th Cir. 2012) (detailing how the state's primary role under cooperative federalism built into the statute arises at the implementation stage with the generation of the state's SIP); *Galveston-Houston Ass'n for Smog Prevention v. EPA*, 289 Fed. Appx. 745, 746-47 (5th Cir. 2008) (same); *BCCA Appeal Group,* 355 F.3d at 822 (same).

C. It is Necessary and Appropriate for EPA to Modify a State's Nonattainment Recommendation When Monitoring Reflects a Design Value in Excess of the NAAQS

In discussing the statutory provision actually at issue in this case, Texas cites 42 U.S.C. § 7407(d)(1)(B)(ii) for the proposition that EPA has limited authority to modify a state's recommended designation because it provides that the "Administrator may make such modifications as the Administrator deems *necessary* to the designations of the areas . . . ." Texas Br. 6 (emphasis added). Texas argues that in using the word "necessary," Congress intended to impose a stringent burden on EPA when concluding that a state's recommended designation should be modified. *Id.* To complete its argument, Texas then asserts that EPA's modification of Texas's attainment recommendation for Bexar County is not

"necessary," because modeling purports to show that it will meet the 2015 ozone NAAQS in several years.[13]

There is no dispute that, as EPA explained, the "statute does not define the term 'necessary.'" 83 Fed. Reg. at 35,138/1. *See also* Texas Br. 18-19. In such situations it is EPA and its Administrator, not Texas using a dictionary, that fills the gap left by Congress and defines when EPA "deems it necessary" to modify a state's designations. "Under *Chevron*, we read Congress's silence as a delegation of authority to [the agency] to select from among reasonable options." *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 505 (2014). *See also Utility Air Regulatory Grp.* v. *EPA*, 573 U.S. at 315 ("Under *Chevron*, we presume that when an agency-administered statute is ambiguous with respect to what it prescribes, Congress has empowered the agency to resolve the ambiguity."). The lack of a definition of the word "necessary" in 42 U.S.C. § 7407(d)(1)(B)(ii) is, in fact, a

[13] In support of its argument, Texas makes much of the fact that the statute allows for the Administrator to modify a state's recommendation when it is "necessary" to do so, rather than when it is "appropriate" to do so, arguing that "necessary" presents a higher bar for EPA. Texas Br.18-20. But there is no real distinction here, as Congress essentially treats these terms as interchangeable in this context. For instance, while 42 U.S.C. § 7407(d)(1)(B)(ii) allows the Administrator to modify a State's recommendation when he deems it "necessary," it further provides that after providing notice of his intended modification, the Administrator shall provide the "State with an opportunity to demonstrate why any proposed modification is *inappropriate.*" (Emphasis added). Therefore, if the modification is simply "appropriate," it must be upheld. In any event, as described herein, EPA's modification of Texas's Bexar County recommendation was both appropriate and necessary.

"delegation of authority to the agency to fill the statutory gap." *Catawba County*, 571 F.3d at 35 quoting *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). *See also Pa. Dep't of Envtl. Prot. v. EPA*, 429 F.3d 1125, 1126 (D.C. Cir. 2005).

Here, EPA did address the ambiguity of the word "necessary" in section 7407(d)(1)(A), i.e., it filled the statutory gap. EPA expressly concluded that the word "necessary" means that the Administrator is to "modify designation recommendations that are inconsistent with the statutory language." 83 Fed. Reg. at 35,138/1. That statutory language is that "any area that does not meet the [NAAQS]" is to be deemed nonattainment. 42 U.S.C. § 7407(d)(1)(A). Thus, as EPA has determined, when certified monitoring data establishes that a county "does not meet the [NAAQS]," it is "necessary" for the Administrator to modify a state's recommendation that the county in question does meet the NAAQS, so that the designation is consistent with the statutory definition of "nonattainment."

Texas makes no attempt to argue that EPA's definition of the term "necessary" is not "a permissible construction of the statute," which is what is required to find EPA's definition invalid. *Chevron*, 467 U.S. at 842-43. Instead, Texas applies its own definition of the word "necessary," which it plucked from various choices in selected dictionaries. Texas Br. 18-19. Unsurprisingly, Texas seizes from the many definitions of "necessary" those that are to its liking. In

contrast, Black's Law Dictionary (10th ed. 2014) defines "necessary" as "that is needed for some purpose or reason," and EPA's application comports with this meaning. EPA's modification of Texas's recommended designation for Bexar County "was needed" to comply with a statute finding nonattainment when the level of ozone "does not meet the NAAQS."

Ultimately, however, one need not – and should not – resort to comparing competing dictionary definitions. Texas has conceded that it is EPA's interpretation that must be applied: "Section 107 [42 U.S.C. § 7407] 'says nothing of what precisely will render a modification necessary,' and thus leaves the necessity of modifications to EPA's discretion." C.I. 0364 at 2 (quotations omitted). And this is not merely because the term "necessary" is ambiguous.

As Texas itself explains, because of *other* wording in the statute, EPA's discretion to determine the circumstances under which it is necessary to modify Texas's (revised) recommended designation is extraordinarily broad. Section 7407(d)(1)(A) "authorizes EPA to revise state-submitted designations whenever *it 'deems'* such modifications 'necessary.'" *Catawba County*, 571 F.3d at 35 (emphasis added). Texas notes the significance of this language, first declaring that the statute "grants EPA significant discretion in making designations" and the "CAA gives EPA wide-ranging discretion 'to make such modifications as the Administrator deems necessary.'" C.I. 0297 at 3. Texas then explains that the

"courts have recognized that EPA has 'discretion to determine, based on available information, whether an area is in "attainment" or "nonattainment with the [relevant] air quality standard'" and that the statement that the Administrator may modify a state's recommendation when the Administrator "deems necessary" especially "gives the EPA discretion to change a state's recommended designation." *Id.* Texas further explains that in interpreting a statute that allows the agency to act when the Administrator "deems necessary," the "D.C. Circuit described this 'deems necessary' language, which section 107 [42 U.S.C. § 7407(d)(1)(A)] also contains, as an 'explicit and extraordinarily broad' delegation of authority." *Id.* *See also* pp. 2-3 (citing cases from other Circuits recognizing "EPA's discretion to determine, based on available information, whether an area is in attainment or nonattainment," and ending with the Governor's declaration: "I am aware of no contrary authority.").[14]

Texas argues that EPA did not exercise its broad discretion because it determined that "the Clean Air Act prohibited it from even considering the [photochemical source apportionment] modeling data" that Texas relied on. Texas Br. 2-3, 30-31. But that is not accurate, as consideration of data from this model is

[14] In its brief, Texas asserts that EPA is not entitled to deference because it was not interpreting the statute but rather applying the unambiguous declarations of Congress. Texas Br. 29-30. Texas's own statements detailed herein belie that position.

not prohibited. As reflected in the 2015 Guidance, "source apportionment results will be considered as just one part of an overall assessment of the potential nonattainment area boundaries." C.I. 0061 Attachment 3 at 12. *See also* fn. 11, *supra*, explaining that EPA relies on modeling for present designations when appropriate. The ability to consider such data, does not, however, require EPA to base designations on modeling of future emissions in the face of unchallenged qualified monitoring data measuring actual current ozone levels.

Source apportionment modeling of future emissions is generally used in Step 3, the NAAQS implementation process, in what is termed an "attainment demonstration." There, a state must delineate the actions it plans to take to bring an area into attainment over time and then demonstrate through modeling that such actions are calculated to reach attainment by the required future date. *BCCA Appeal Group*, 355 F.3d at 823, 830-32; *Galveston-Houston*, 289 Fed. Appx. at 747-50. The use of modeled future (predicted) ozone levels is appropriate when one is required to predict the future.

Even there, however, this Court has observed that "photochemical grid models are imperfect tools for predicting future air quality." *BCCA Appeal Group*, 355 F.3d at 832. Thus, even when used to make future predictions, as required for attainment demonstrations, the modeling must be carefully used and scrutinized. *See, e.g.*, 40 C.F.R. part 51, subpart CC, Appendix W (setting out very extensive

guidelines for the use of air quality models and describing the inherent uncertainties, input variables, and other highly technical factors involved in such modeling).

While modeling is a useful tool, predictions of future ozone air quality based on predicted emissions of precursors are not germane to assessing whether the *present* air quality is in compliance with the ozone NAAQS when current data from regulatory monitors show actual ozone levels that presently violate the standard. For instance, the source apportionment modeling that Texas relies on here is based on data from 2012 (not the most recent data). It also projects emissions ozone levels for years 2017, 2020 and 2023, not for the three consecutive years by which EPA judges attainment. C.I. 0428 (TSD) at 20. Additionally, the source apportionment modeling provided by Texas is based on assumptions about future conduct that may or may not come to pass. This includes, for instance, projected closure of a large stationary source and other "anticipated" events that are not required to occur. C.I. 0427 (RTC) at 11. *See also* C.I. 0356 at 13-15 (listing other assumptions). Accordingly, such modeling does not change the fact that two air quality monitors in Bexar County show violations of the NAAQS based on certified data for the most recent three-year

measured period and thus could not alter the conclusion that Bexar County is in nonattainment of the NAAQS.[15]

Here, EPA determined that the statute does not require it to look to future predictions of attainment in the face of present, unchallenged monitoring data. In addition to the considerable deference accorded to EPA in the designation process under the specific designation provision (42 U.S.C. § 7407(d)(1)) as outlined above, all agencies are entitled to deference in interpreting and applying a statute they administer (e.g., when to "deem" it "necessary" to modify a state's recommendation). Particular deference is to be given to an agency's interpretation of a statute that is complex and within the agency's expertise. *United States v. Mead Corp.*, 533 U.S. 218, 227-31 (2001). The CAA is precisely this type of statute. *NRDC v. EPA*, 571 F.3d 1245, 1251 (D.C. Cir. 2009). "Our 'broad deference is all the more warranted when, as here, the regulation [being challenged] concerns "a complex and highly technical regulatory program."'" *St. Luke's Hosp. v. Sebelius*, 611 F.3d 900, 904-05 (D.C. Cir. 2010). Accordingly,

[15] Sierra Club's central argument also hinges on the use of the same source apportionment modeling of future emissions that Texas seeks to rely on, in Sierra Club's case to support *present* proposed nonattainment designations for three nearby counties. As discussed at Section III, *infra*, EPA also rejected Sierra Club's proposed use of the model for such purposes.

"Federal courts accord 'great deference' to the EPA's construction of the Clean Air Act." *BCCA Appeal Group*, 355 F.3d at 825.

Additionally, EPA's prior and consistent interpretations and application of a statute -- that attainment of the NAAQS is to be judged based on current monitoring data -- is to be accorded substantial deference. *Envtl. Defense v. Duke Energy Corp.*, 549 U.S. 561, 575 (2007); *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 487 (2004) ("We 'normally accord particular deference to an agency interpretation of longstanding' duration.") (Citations omitted). And once again Texas agrees, acknowledging that with regard to the modification process, "EPA's discretion is recognized in the plain text of the CAA, judicial interpretations of the CAA, and EPA's past practices under the CAA." C.I. 0364 (Texas comments) at 2.

In conjunction with the 2008 Designation rule, EPA, as it did here, issued a Guidance to assist states in assessing how to designate areas as attainment or nonattainment, including the nature and quality of the data to be assessed and the factors to be considered. *Mississippi Comm'n*, 790 F.3d at 147. There, as here, EPA informed states that NAAQS violations, and hence nonattainment status, would be identified "using data from . . . monitors that are sited and operated in accordance with" EPA's regulatory requirements. *Id.* There, as here, states were to make such identifications based on the most recent three consecutive years of

certified air quality data. *Id.* at 148. And this construct has long been acknowledged by this Court. *Galveston-Houston*, 289 Fed. Appx at 751, n.4 (explaining that the NAAQS is violated if it exceeds the threshold based on monitoring data).

When an agency makes a determination of what is required under a statute, "[a] court must uphold the [agency's] judgment as long as it is a permissible construction of the statute, even if it differs from how the court would have interpreted the statute in the absence of an agency regulation." *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 826–27 (2013) (citing *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005)). *See also Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009) (The agency's interpretation must be upheld "if it is a reasonable interpretation of the statute – not necessarily the only possible interpretation, nor even the interpretation deemed most reasonable by the courts."); *City of Arlington* v. *Federal Commc'ns Comm'n*, 569 U.S. 290, 304 (2013). EPA's construction and application of the statute, as well as its technical determinations, are both rational and reasonable and as such, must be upheld.

D. The Dictionary Act Does Not Require EPA to Consider Predictions of Future Compliance with the NAAQS in Making Area Designations under the CAA

Texas concedes that the relevant provision of the CAA defining the primary categories of designations, 42 U.S.C. § 7407(d)(1)(A), is written in the present tense. Texas Br. 16. It identifies no other provision of the CAA that transforms that provision into the future tense. Instead, relying solely on the Dictionary Act, 1 U.S.C. § 1, Texas asserts that a state may establish attainment with an existing NAAQS if it can show that it will attain the NAAQS in the future. In other words, acceding to EPA's discretion to interpret and apply the designation provisions of the CAA, Texas argues that EPA got it wrong because it ignored the Dictionary Act, instead applying the express wording *and* "context" of the CAA.

1. Texas Has Waived the Argument that the Dictionary Act Allows Reliance on Future Predicted Attainment to Designate Bexar County

It is a fundamental rule of administrative law that arguments not raised before the agency during the administrative process may not be the subject of appellate review. *United States v. L.A. Trucker Truck Lines, Inc.*, 344 U.S. 33, 36 (1952) ("We have recognized in more than a few decisions, and Congress has recognized in more than a few statutes, that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues

reviewable by the courts. . . . [C]ourts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice."); *Sims v. Apfel*, 530 U.S. 103, 112 (2002) (O'Connor, J., concurring) ("In most cases, an issue not presented to an administrative decisionmaker cannot be argued for the first time in federal court. On this underlying principle of administrative law, the Court is unanimous."); *Appalachian Power Co. v. EPA*, 251 F.3d 1026, 1036 (D.C. Cir. 2001) (It is "black letter administrative law" that a party must raise its arguments in comments to the agency "in order for the court to consider the issue.").

The purpose and basis for this issue exhaustion doctrine, and indeed the very integrity of the administrative process, demands that the issue exhaustion doctrine be strictly enforced. *L.A. Trucker*, 344 U.S. at 36-37. *See also BCCA Appeal Group*, 355 F.3d at 828-29, quoting *Unemployment Comp. Comm'n v. Aragon*, 329 U.S. 143, 155 (1946) ("For the federal courts to review a petitioner's claim in the first instance would 'usurp [ ] the agency's function' and 'deprive the [EPA] of an opportunity to consider the matter, make its ruling, and state the reasons for its action.' [Citation omitted] This is a basic tenet of administrative law generally.").

Application of the exhaustion doctrine is particularly appropriate with regard to the failure to raise legal arguments (such as modification of the express language of 42 U.S.C. § 7407(d)(1) by the Dictionary Act). "Generally, in considering a

petition for review from a final agency action, this court will not consider questions of law which were neither presented to nor passed on by the agency." *BCCA Appeal Group*, 355 F.3d at 828. *See also Bass v. U.S. Dep't of Agric.*, 211 F.3d 959, 964 (5th Cir. 2000); *Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 208 F.3d 475 (5th Cir. 2000); *Galveston-Houston*, 289 Fed. Appx. at 752. And there is no exception to the exhaustion doctrine for cases challenging determinations made under the NAAQS program. *See BCCA Appeal Group*, 355 F.3d at 828; *S. Coast Air Quality Management Dist.,* 472 F.3d at 891; *Masias v. EPA*, 906 F.3d at 1075 (dismissing claims challenging NAAQS designations because they were not raised with specificity before EPA).

As outlined above, Texas made numerous submittals to EPA regarding the designation of Bexar County, including its amended designation with attached report (C.I. 0297) and its comments on EPA's intended designation. C.I. 0364. Not once in those or any other submission did Texas assert – let alone, explain -- why or how the Dictionary Act requires EPA to base its designations on future attainment. Having never raised the argument, Texas deprived EPA of the opportunity to consider it, analyze it, and set forth in its decision-making document why EPA did or did not alter its Final Designation based on the Dictionary Act. Accordingly, Texas is barred from asserting its Dictionary Act claim in this case.

2. The Dictionary Act Does Not Alter the Unambiguous Wording of the Designation Provision of the Clean Air Act

If this Court *were* to consider the Dictionary Act, it should conclude that it has no application here. As explained in *Guidiville Band of Pomo Indians v. NGV Gaming* Ltd., 531 F.3d 767, 775 (9th Cir. 2008), the Supreme Court has examined the Dictionary Act a number of times and "has not once invoked the Dictionary Act in an effort to convert an unambiguous verb tense into claimed ambiguity, let alone then going on to employ that manufactured ambiguity as a stepping stone to altering the plain sense of the statute." Instead, the Supreme Court has explained numerous times that verb tense in a statute is significant and if it is clear in a statute, it must be adhered to because that was the intent of Congress. *United States v. Wilson*, 503 U.S. 329, 333 (1992) ("Congress's use of a verb tense is significant in construing statutes."); *Carr v. United States*, 560 U.S. 438, 448 (2010) ("Consistent with normal usage, we have frequently looked to Congress's choice of verb tense to ascertain a statute's temporal reach.").

As the Supreme Court further explained,

> Similarly, *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 [ ] (2002), made clear that in "all statutory construction cases, we begin with the language of the statute." Inquiries into the meaning of a statute come to an end "if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Id.* quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 [ ] (1997) (internal quotation marks omitted)).

United States v. Wilson, 503 U.S. at 333. If such is the case, "it is not apparent why the Dictionary Act must even be consulted." *Guidiville,* 531 F.3d at 776. As outlined above, the language of 42 U.S.C. § 7407(d)(1)(A) is clear and analysis of what is required under the statute should end there.

Even consulting the Dictionary Act does not change the outcome. "On its own terms the Dictionary Act . . . looks first to 'context,' and only if the 'context' leaves the meaning [of a statute] open to interpretation does the default provision come into play." *Sherley v. Sebelius*, 644 F.3d 388, 403 (D.C. Cir. 2011), quoting *Guidiville*, 531 F.3d at 776. As Texas explains, the "context" is that of the underlying statute, in this case 42 U.S.C. § 7407. Texas Br. 24.

There is nothing about the context of 42 U.S.C. § 7407 or any other provision of the CAA that leads one to conclude that a county may satisfy the statutory requirement of being in attainment with the NAAQS by promising or predicting that it will be in attainment with the NAAQS within three years, as Texas suggests. Texas Br. 23-24. To the contrary, Congress expressly declared that counties that are expected to come into attainment within three years are nevertheless deemed nonattainment. Counties such as Bexar, which are categorized as "marginal *nonattainment*," are required to come into attainment within three years. 42 U.S.C. § 7511(a)(1); 40 C.F.R. § 51.1303. *See also* C.I. 0427 (RTC) ("Marginal areas are anticipated to attain the standard [70 ppb] within

3 years."). Where Congress has established a *nonattainment* area classification under which the county is expected to come into attainment within three years, EPA cannot, consistent with the statute, deem a county in attainment *because* it is expected to come into attainment within three years. To do so would read the marginal nonattainment classification out of the statute.

In requiring EPA to make designations, Congress admonished EPA to do so "as expeditiously as practicable." 42 U.S.C. § 7407(d)(1)(B)(i). *See also Ala. Power v. Costle*, 636 F.2d 323, 346 (D.C. Cir. 1980). The need to act with alacrity in issuing designations was also confirmed specifically with regard to the San Antonio area. *In re Ozone Designation Litigation*, 286 F. Supp. 3d 1082, 1088-90 (N.D. Cal. 2018) (rejecting EPA's longer proposed extension and instead giving EPA 127 days to complete the designations for the San Antonio area). EPA has done that and delaying such designation based on Texas's hope that additional data generated over the next several years will prove their predictions correct, simply is inconsistent with the wording and the structure of the statute.[16]

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[16] Waiting for additional data or trying to predict future emissions can, of course, work both ways. While in some cases it can lead to fewer nonattainment designations, in other cases it can result in more nonattainment designations. For instance, in *Mississippi*, Sierra Club argued that EPA erred because, if it had included data from the most recent year where it was collected, even though it was not yet certified, it would have found that additional counties were in nonattainment. 790 F.3d at 156-58. The D.C. Circuit held that "EPA could reasonably conclude that the [designations] process must end at some point" and "the agency did not act arbitrarily in ending it here." *Id.* at 158.

3. Even if the Dictionary Act Were to be Applied, it Would Require Texas to Establish that Bexar County is in Attainment Both in the Future *And* the Present

The CAA defines an attainment area in the present tense, as "any area . . . that meets the [NAAQS]." 42 U.S.C. § 7407(d)(1)(A)(ii). The Dictionary Act, 1 U.S.C. § 1, in turn states that "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise . . . words used in the present tense include the future *as well as* the present." *Id.* (emphasis added). It does not say that words stated in the present tense mean the future *or* the present.

If applied, the Dictionary Act would actually transform the requirement for an area being deemed attainment as one that meets the NAAQS in the present "as well as" one that meets the NAAQS in the future. There is no basis to interpret the phrase "as well as" as "either/or." Accordingly, application of the Dictionary Act does not solve Texas's problem, because regardless of predictions of future attainment, Bexar County still "does not meet the NAAQS" in the present. Dictionary Act or no Dictionary Act, the Final Designation issued by EPA for Bexar County should be upheld.

III. THERE IS NO BASIS TO OVERTURN EPA'S DESIGNATION OF ATASCOSA, COMAL AND GUADALUPE COUNTIES AS ATTAINMENT/UNCLASSIFIABLE

Sierra Club argues that EPA's ultimate designation of nonattainment areas is under-inclusive, contending that EPA should have designated Atascosa, Comal,

and Guadalupe Counties as nonattainment. None of these counties exceed the 70 ppb ozone NAAQS, and Sierra Club does not allege that they do. Rather, Sierra Club argues that they should have been deemed nonattainment because they purportedly "contribute[ ] to ambient air quality in a nearby area [Bexar County] that does not meet the [NAAQS]." 42 U.S.C. § 7407(d)(1)(A)(i). In seeking to overturn EPA's designations for these counties, Sierra Club argues that EPA: (a) failed to examine the available information and articulate a rational explanation for its decision; (b) acted inconsistently with past designations; and/or (c) applied an interpretation of the word "contribution" that is inconsistent with the CAA and the Agency's own interpretations of that word. Sierra Club Br. 37-45. Sierra Club is incorrect on all counts.

A. EPA Examined All Relevant Factors and Articulated a Rational Explanation for Designating Atascosa, Comal and Guadalupe Counties Attainment/Non-classifiable

Having determined that Bexar County was nonattainment based on certified data from regulatory air quality monitors, EPA proceeded to apply its five-part "weight-of-the-evidence" analysis to assess whether any of the other seven counties in the San Antonio area is contributing to the nonattainment of Bexar County. C.I. 0428 (TSD) at 8. Those five factors are: (1) air quality data; (2) emissions and emissions related data (including, e.g., locations of key sources like power plants, population growth patterns, and traffic); (3) meteorology (weather

and air transport patterns); (4) geography/topography; and (5) jurisdictional boundaries. *Id.* at 5. Sierra Club does not challenge EPA's use of this five-part weight-of-the-evidence test to assess whether nearby counties contribute to the ambient air quality of Bexar County. That is not surprising, given that the courts "have repeatedly upheld [EPA's] multi-factor contribution analysis as consistent with the Act's designation process under [CAA] section 107 [42 U.S.C. § 7407]." *Mississippi Comm'n*, 790 F.3d at 159, citing *ATK Launch Sys.*, Inc., 669 F.3d 330 (D.C. Cir. 2012); *Catawba County*, 571 F.3d at 39; Sierra Club Br. 38.

EPA performed a detailed analysis of each of the five factors, first in its Intended Area Designations Technical Support Document (C.I. 0314), and then again after receiving comments from Sierra Club, EDF, and Texas, in its Final Area Designations Technical Support Document (TSD). C.I. 0428. EPA's analysis of Factor One, the air quality data (i.e., the monitoring data described *supra*), is explained at pp. 6-9 of the TSD and includes maps, tables, trends and analysis. As explained more fully below, while there are no air regulatory monitors in, and hence no certified air quality monitoring data from, the seven surrounding counties, the data from Bexar County is relevant to EPA's analysis of potential contribution from those nearby counties. Most important are the locations of the violating monitors within Bexar County and the magnitude of the violations at those monitors.

In addition to air quality data (Factor 1), EPA assessed the emissions data (Factor 2). It examined not only the emissions inventory but also the location and magnitude of large and small point sources of emissions, on road and off-road mobile sources of emissions, and other sources, such as fires, in the eight counties. *Id.* at 9-11. This analysis showed that emissions of precursors (NOx and VOCs) in Atascosa, Comal, and Guadalupe and other nearby counties were a relatively small fraction of the emissions from Bexar County itself. *Id.* at 10-11. EPA then analyzed the emissions sources in the nearby counties and their geographic location in relation to all the monitors in Bexar County. For instance, Figure 3 on p. 11 of the TSD exhibits that Atascosa has only one large point source (compared to nine in Bexar County), and that single source is located south of Bexar County, 50 miles from the Bexar County monitors and closest to the Bexar County monitor that is *under* the 70 ppb NAAQS. *Id.* at 21 and 6 (Map).

As part of its analysis of Factor 2, EPA also analyzed the population of each county. This included analysis of the numbers of residents, density (people per square mile), population growth, traffic and vehicle patterns, such as miles traveled and commuting patterns, and various sources of precursor emissions. *Id.* at 12-15. This showed that nearly 80% of the population of the entire eight-county area resides in Bexar County itself. *Id.* at 12. It further showed that in addition to Comal, Guadalupe, and Atascosa Counties having just a fraction of the population

of Bexar County (7%, 8%, and 2.5%, respectively), the number of persons commuting from these counties to Bexar County, in comparison to the number commuting *within* Bexar County (579,420 commuters), was respectively 2.9%, 3.9%, and 1%. *Id.* at 14 (chart).

EPA then analyzed Factor 3, meteorology, including wind and air flow patterns. EPA assessed how these elements might affect the fate and transport of ozone precursor emissions. To better understand the effects of these factors, EPA used the National Oceanic and Atmospheric Administration's ("NOAA") hybrid single particle lagrangian integrated trajectory ("HYSPLIT") model. *Id.* at 16. This model creates "back trajectories" to estimate the path of air masses travelled before reaching a monitor at a specific time (e.g., when an exceedance occurs at a violating monitor). *Id.* EPA found that the back trajectories for each exceedance day at the two Bexar County violating monitors showed air flow "predominantly from the east, southeast, and south." *Id.* at 19.

As one can see from the map of the 8-county San Antonio area, Comal County is generally to the North and Guadalupe County is generally to the Northeast and partially to the east of Bexar County and its violating monitors, away from the predominant wind patterns on violation days. *Id.* at 6. EPA further noted that when the air flow patterns do come out of the north/northeast where these two counties are located in relation to Bexar County, they flow through a

large portion of Bexar County, which has significantly greater emissions, before reaching the violating monitors. For example, Bexar County has 9 and 11 times more vehicle miles travelled, as well as 34 and 25 times the number of commuters of Comal and Guadalupe Counties, respectively. *Id.* Additionally, there are several major stationary emission sources between Guadalupe County and the violating monitors. *Id.* at 6 (map of monitors) and 11 (map of large point sources).

Further evaluating these factors, EPA noted that while Atascosa County was in the general wind trajectory (south) that could bring emissions to Bexar County, these same wind trajectories would sweep from the southern-most Bexar County monitor (which shows no ozone NAAQS violation) to the two northern monitors (which do show violations). *Id.* at 21. One potential implication of this is that emissions likely to contribute to ambient air quality at the two Bexar County monitors violating the NAAQS are coming from Bexar County sources located between the non-violating southern Bexar County monitor and the two northern violating monitors. *See* map of monitors at *id.* at 6.

As EPA noted, Factor 4 (geography/topography) had little impact on its analysis of this specific designation process, because "[t]he San Antonio area does not have any geographical or topographical features [e.g. mountain ranges] significantly limiting air pollution transport in its air shed." *Id.* at 19. Finally,

EPA analyzed Factor 5 (jurisdictional boundaries) in relation to all of the other factors (described *supra* and *infra*).

EPA also specifically considered and analyzed the photochemical source apportionment modeling of predicted future levels of ozone submitted by Texas. As discussed *supra,* this model is not designed to provide substantial support for area designations, and EPA did not use the model to base area designations on predictions of future levels of ozone. But such modeling can potentially shed light on *relative* indications of impacts of emissions from various sources in the context of a contribution analysis. *Id.* at 20. For instance, this modeling predicted that for the year 2023, Bexar County is projected to contribute 84% of the high-day ozone contributions from the 8-county San Antonio region. *Id.*

The analysis outlined above, as fully set forth in EPA's decision documents, clearly shows that EPA did not fail to examine the available information and articulate a rational explanation for its decision. Indeed, Sierra Club concedes that EPA conducted its case-by-case five-factor evaluation of Atascosa, Comal, and Guadalupe Counties "to determine whether those counties contributed to violations of the standard in Bexar [County]" in a manner that was "[c]onsistent with its national guidance." Sierra Club Br. 37. Ultimately, Sierra Club merely disagrees with the conclusions EPA drew from the data in applying the five factors of EPA's weight-of-the-evidence test. That, of course, is not a basis to overturn an agency's

factual determination as arbitrary and capricious. *See* pp. 77-79 *infra*. And in this case, Sierra Club offers scant evidence to support even reasonable disagreement.

Sierra Club asserts that the HYSPLIT air transport analysis is "consistent with pollution transport from these [nearby] counties to the violation monitors [in Bexar County]." Sierra Club Br. 44. The HYSPLIT model attempts to assess wind and air patterns and it does not mark the actual flow of specific emissions, such as VOCs or NOx. Additionally, it does not assess whether or how the precursor emissions combine on a given day to react with sunlight to form ozone. Thus, while the HYSPLIT model provides useful information to be considered with other data, "HYSPLIT trajectories alone do not conclusively indicate contribution to measured high concentration of ozone. Therefore, they cannot be used in isolation to determine inclusion or exclusion of an area within a nonattainment boundary." C.I. 0061 (2015 Guidance) at Attachment 3, p.8.[17]

In any event, Sierra Club's own conclusions based on the HYSPLIT wind flow modeling do not support nonattainment designations for the three Nearby

[17] Sierra Club states that "EPA's own HYSPLIT analysis demonstrates that emissions from those [nearby] counties travel to and contribute to the violation monitors of Bexar County," citing pp. 17-18 and 20-22 of the TSD (C.I. 0428). But those pages (and the rest of the TSD) contain no such conclusion. Pages 17-18 of the TSD are merely the maps of air flows generated by the HYSPLIT model. Pages 20-22 of the TSD are labeled "Conclusions for the San Antonio-New Braunfels Area" and EPA concluded that there was *not* sufficient evidence to designate Atascosa, Comal and Guadalupe Counties as nonattainment based on contribution to the violating monitors in Bexar County.

Counties, and certainly do not support finding that EPA's conclusions based on the same modeling are arbitrary. Sierra Club states that "the prevailing winds are typically from the south and southeast." C.I. 0356 (Sierra Club Comments) at 19. As noted, Guadalupe and Comal Counties are generally to the North, Northeast, and partially to the East of Bexar County (and the violating monitors). C.I. 0428 (TSD) at 6. Thus, based on Sierra Club's own characterization of the data, Guadalupe and Comal Counties are not in the path of the "prevailing winds" on days the monitor exceeds the ozone standard.

Further, Sierra Club concedes that "[i]n its analysis of Atascosa county, EPA noted that the Calaveras Lake Monitor, located at the southeastern edge of Bexar County, is meeting the 2015 ozone NAAQS." Sierra Club Br. 44, n.22. Sierra Club asserts that some modeling trajectories "indicate that pollution from Atascosa County bypasses the Calveras Lake Monitor," *id.*, but it provides no explanation. For instance, Sierra Club does not account for or consider emissions on those same flow paths generated within Bexar County. Nor does Sierra Club address the fact that in the relatively unpopulated Atascosa County, the sole large point source of potential ozone precursor emissions is more than fifty miles away from the two violating monitors in Bexar County. C.I. 0428 at 21. Thus, even accepting *arguendo* the assertion that "some" back trajectories may reach around the southern Bexar County monitor and yet still reach the northern monitors, that is

just one piece of the puzzle in which all of the relevant factors must be considered and weighed, as EPA's 2015 Guidance makes abundantly clear.

Furthermore, Sierra Club asserts that a significant amount of ozone that contributes to the Bexar County violating monitors comes from NOx and VOCs emitted as hydrocarbons from oil and gas facilities in the Eagle Ford Shale. C.I. 0356 at 19-21. As Sierra Club explains, the majority of emissions from the Eagle Ford Shale come from Karnes, LaSalle, Dimmit and Webb Counties. *Id.* Yet, Sierra Club asserts that EPA acted arbitrarily by failing to find that three *different* counties – Atascosa, Comal, and Guadalupe – significantly contribute to nonattainment in Bexar County. Indeed, the Eagle Ford Shale spans a 26-county area and only one of the three counties Sierra Club argues should be designated nonattainment based on contribution to ambient air quality in Bexar County, Atascosa County, is even located in the Eagle Ford Shale. C.I. 0427 (RTC) at 9.[18]

EDF in its comments similarly cites to the Eagle Ford Shale as a significant source of emissions of NOx and VOCs. It cites to a study by the University of Texas that shows hydrocarbon concentrations (containing NOx and VOCs) at a non-regulatory monitor in Karnes County were "twice as high as any other monitor

[18] A map of Eagle Ford Shale depicting the counties within and outside the Shale can be found at http://static1.squarespace.com/static/573b17cb60b5e908af422afb/573f89f7d518ad44eea7d80a/573f8a3ed518ad44eea7dc32/1463781950073/eaglefordshaleplay2015-09-lg.jpg?format=original.

in the State." Karnes County is beyond the 8-county San Antonio-New Braunfels CMSA and located to the southeast of Bexar County in the "prevailing winds." Thus, to the extent such a level of emissions could be said to contribute to violations at the Bexar monitors, this fact supports the view that contributing counties may be ones other than Atascosa, Comal, and Guadalupe Counties. And this is quite possible, since emissions do not necessarily come from nearby counties as they can come from hundreds of miles away. 83 Fed. Reg. at 35,137/2.

Indeed, as EDF explains, "the Air Improvement Resources Executive Committee recently recognized the 'influence of transported pollution from *beyond* the San Antonio-New Braunfels region [the eight-county San Antonio area], which current analysis shows to be responsible on average for 68% of the peak 1-hour high ozone days recorded at local regulatory monitors in Bexar County.'" C.I. 0357 at 9-10 (emphasis added). *See also* C.I. 0362 at 3, table (Alamo Council modeling estimating that 80% of 8-hour ozone at Bexar County violating monitors on greater than 60 ppb days comes from outside the 8-county San Antonio area). Based on this analysis, major responsibility for peak ozone days should be assigned to areas beyond the 8-county San Antonio area, i.e., from counties *other than* Atascosa, Comal and Guadalupe Counties. And, as explained by EPA in the TSD and in the study cited by EDF, the vast majority of emissions from within that

8-county area comes from stationary (point) and mobile sources *within* Bexar County.

As is discussed *supra*, the CAA limits the nonattainment area contribution analysis to "nearby area[s]." 42 U.S.C. § 7407(d)(1)(A)(i). While this may constrain EPA from concluding that counties outside the 8-county San Antonio area may be contributing to Bexar County air quality, the fact that these more distant areas may be contributing cannot be used to apply a finding of contribution to Atascosa, Comal and Guadalupe Counties.

As to the other factors in EPA's weight-of-the-evidence test, Sierra Club devotes little attention. Sierra Club states that "[a]bout a third of each county's residents commute to Bexar County . . . [and t]he counties are experiencing a combined growth rate of approximately 13%." Sierra Club Br. 45. But isolated references to percentages of residents who commute to Bexar County or the county's percentage of population growth, are hardly enlightening. For instance, as Texas reports, Bexar County's population grew by 400,000 since 2004. Yet during that time the ozone at each of the three Bexar County monitors *dropped* by at least 13 ppb. Texas Br. 9. Looking at population growth more holistically, one can see that Bexar County had a 2015 population of 1,897,753, which grew 182,980 from 2010. C.I. 0428 at 12. In contrast, Atascosa's population in 2015

was 48,435, an increase of 3,524 people from 2010, which is 2% of Bexar County's growth. *Id.*

"The science of ozone formation, transport, and accumulation is complex." 63 Fed. Reg. 57,356, 57,359 (Oct. 27, 1998). For example, ozone is both created *and* destroyed in a cyclical set of chemical reactions involving NOx, VOCs, and sunlight. *Id.* The manner, degree and intensity to which NOx and VOCs contributes to ozone formation depends upon many factors, such as the movement of the air vertically as well as horizontally and the presence and concentrations of various pollutants, which change with time and location. *Id.* "Depending on the local situation, peak ozone concentrations may be NOx-sensitive, VOC-sensitive, or a mix of the two depending on other conditions." C.I. 0061 (2015 Guidance) at Attachment 3, p.3. *See also* p.4 ("The formation of ozone is a complex, nonlinear function of many factors."); C.I. 0297 (Alamo Council modeling) at Appx. B, p.4.

Given the complexity and highly technical nature of the analysis required, EPA's ultimate determination is entitled to extreme deference. *Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 519 (D.C. Cir. 2009) ("[W]e give an extreme degree of deference to the agency when it is evaluating scientific data within its technical expertise") and the agency's technical determination is presumed valid. In such situations,

> EPA's decision "is entitled to a presumption of regularity" . . . [which] places a "considerable burden" on the challenger to overcome

> the EPA's chosen course of action. [Citation omitted] This is particularly true where – as here – the agency's decision rests on an evaluation of complex scientific data with the agency's expertise.

Texas Oil & Gas Assn v. EPA, 161 F.3d 923 (5th Cir 1998). *See also BCCA Appeal Group,* 355 F.3d at 832; *Medina Cnty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010) ("Where an agency's particular technical expertise is involved, we are at our most deferential in reviewing the agency's findings.")

There is no doubt that this level of deference applies to EPA's designation of attainment/nonattainment under the NAAQS program. *ATK Launch Systems,* 669 F.3d at 336; *Catawba County*, 571 F.3d at 41; *Mississippi Comm'n*, 790 F.3d at 150 (the Court is to "give an 'extreme degree of deference' to the EPA's evaluation of 'scientific data within its technical expertise," [citations omitted], especially where, as here, we review the 'EPA's administration of the complicated provisions of the Clean Air Act," which in this case was the designation provision at 42 U.S.C. § 7407(d)(1)(A) [citations omitted].).

Ultimately, if the agency's "determination is supportable on any rational basis, a court must uphold it, especially 'when an agency is acting within its own sphere of expertise.'" *National Parks Conservation Ass'n v. McCarthy*, 816 F.3d 989, 994 (8th Cir. 2016) (quotation omitted). *See also, Wilson v. U.S. Dep't of Agric.*, 991 F.2d 1211, 1215 (5th Cir. 1993) (agency action "need only have a

rational basis" and its determination is arbitrary and capricious "only when it is so implausible that it could not be ascribed to a difference of view or the product of agency expertise.").

More specifically, in assessing EPA's application of the five factors of the weight-of-the-evidence test to a given attainment or nonattainment designation, a court "will overturn the EPA's designations only if the agency applied the test 'so erroneously in a particular case that it would not have reasonably concluded that a county was [or was not] contributing to nearby violations.'" *Mississippi Comm'n*, 790 F.3d at 162, quoting *Catawba County*, 571 F.3d at 40-41. And the Court will not overturn EPA's "contribution" conclusion simply because it would reach a different conclusion. Instead, so long as EPA considered all five factors and articulated a "rational connection between the facts found and the choice made," its conclusion is to be upheld. *Coastal Conservation Ass'n v. Dep't of Commerce*, 846 F.3d 99, 111 (5th Cir. 2017).

As discussed at p. 85 *infra*, the standard applied by EPA is whether the nearby counties *sufficiently* contribute to ambient air quality at the violating monitors in Bexar County, such that they should themselves be deemed nonattainment. If there is not sufficient evidence to make a positive contribution determination, EPA must classify the county as attainment/unclassifiable. Sierra Club's own (limited) analysis of the data falls far short of overriding the extreme

deference and presumption of regularity EPA is accorded in weighing the data and concluding that Atascosa, Comal and Guadalupe Counties do not sufficiently contribute to ambient air quality at the two violating monitors in Bexar County.[19]

B. EPA's Designations for Atascosa, Comal and Guadalupe Counties Are Not Inconsistent with its Designations of Other Counties in Texas from Other Time Periods

Sierra Club asserts that "EPA's approach to Atascosa, Comal, and Guadalupe Counties is arbitrarily inconsistent with the agency's nonattainment designations for other parts of Texas under 2008 ozone [NAAQS . . . where, according to Sierra Club] EPA relied on source-apportionment modeling demonstrating that Wise County emissions contributed more than one percent of the ozone impacts to violating monitors in the Dallas Fort Worth area." Sierra Club Br. 41.

First, basing attainment designations on comparisons to unrelated counties is fraught with danger. "Given 'significant' differences among counties, 'a direct

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[19] Straining credulity to attempt to find some basis that fits into the Supreme Court's test for arbitrary and capricious decisions, Sierra Club asserts that EPA "ignored an important aspect of the problem" because it did not mention the "possibility" that Atascosa, Comal and Guadalupe Counties could themselves be experiencing pollution in excess of the 2015 NAAQS. Sierra Club Br. 43-44. There is no evidence of such possibility and Petitioners offer no such evidence. In fact, Petitioners do not even allege that any of these three Counties are, in fact, themselves over the NAAQS – or even close. EPA does not act arbitrarily by refraining from further addressing unasserted possibilities. In any event, Sierra Club failed to raise this argument in its comments to EPA and, as explained at pp. 59-60, *supra*, its claim is therefore waived.

one-to-one comparison of the data,' including the methods used to measure such data, could be 'inappropriate' or even 'illogical.'" *Mississippi Comm'n v. EPA*, 790 F.3d at 169 (which addressed the designation for Wise County under the 2008 NAAQS that Sierra Club relies upon). That is overwhelmingly true here, where Sierra Club attempts to compare the designations at issue with one made in another part of the State and under the 2008 NAAQS.

Even if one were to engage in such a comparison, Sierra Club cites no record evidence even relating to the designation of Wise County. There is no citation to anything in the record relating to the factors considered, the nature or even level of emissions from Wise County, the distance of Wise County to violating monitors in the Dallas/Fort Worth area, the weather conditions, the air flow patterns, or any other actual fact. It is wholly impossible to conclude that EPA's conclusion as to Atascosa, Comal and Guadalupe Counties here, is inconsistent with its determinations made under the 2008 standard as to Wise County.

Sierra Club cites only the court's decision in *Mississippi Commission* as its basis for arguing that EPA's decision in this case is inconsistent with its decision with regard to Wise County. Sierra Club Br. 41-42. But even there the court explained that the significant "differences between Wise County and those [other] counties make a direct one-to-one comparison of the data underlying the analyses inappropriate." 790 F.3d at 170. The information that we can garner about Wise

Country from the Court's opinion in *Mississippi Commission* make that even more evident.

For instance, "*seven* violating monitors surrounded Wise County and some of the monitors – including one located one-half mile from Wise County's border – reported levels of ambient ozone higher than anywhere else in the United States." *Id.* (emphasis added). Here, neither Atascosa, Comal nor Guadalupe County is surrounded by violating monitors. Furthermore, the ozone levels at the two violating monitors in Bexar County are not "higher than anywhere else in the United States." To the contrary, the ozone levels at the two Bexar County monitors have resulted in designated nonattainment at the lowest classification – marginal. This, of course, is before any analysis is conducted of the air flows in the counties in the San Antonio area in relation to the air flow in and around Wise County, the size and sources of emissions in each county in relation to Wise County, the physical features, population, and traffic patterns as they relate to those in Wise County, the relative meteorology affecting these counties in comparison to the meteorology and its effects in Wise County, and the other factors that comprise the five-part weight-of-the-evidence test. *See* C.I. 0427 (RTC) at 8-9, describing other significant differences between Wise County and other counties surrounding Dallas/Ft. Worth and the San Antonio area.

Sierra Club focuses on EPA's reliance on source apportionment modeling to make its comparison to Wise County. As outlined *infra*, it argues that EPA must base its contribution determination on a *single* finding from such modeling; that Wise County contributed more than 1% of ozone to the violating monitors in the neighboring county. But that did not even occur with regard to Wise County. In fact, Sierra Club concedes that a "finding" garnered from modeled scenarios that show a predicted contribution of ozone over a certain percentage (1% according to Sierra Club) did not alone form the basis for a nonattainment designation based on contribution. As Sierra Club reports, the court in *Mississippi Commission* "upheld EPA's nonattainment designation [of Wise County] based, *in part*, on modeled pollution contributions." Sierra Club Br. 41 (emphasis added).

Here EPA considered source apportionment modeling with regard to the San Antonio area. While EPA did not find such modeling pertinent with regard to Texas's assertion that EPA should consider future rather than present attainment for Bexar County, it specifically cited to the modeling in its five-part weight-of-the-evidence contribution analysis of the Nearby Counties. C.I. 0428 at 20-22 (under the heading "Texas Modeling Results Submitted" and then under the heading "Conclusions"). It simply came to different conclusions about that modeling than Sierra Club would. The designation EPA made regarding Wise County, in a different rulemaking, under a different NAAQS standard, based on

wholly different facts, most of which are not before the Court, where the factor Sierra Club cites to was admittedly just one factor considered by EPA in issuing its nonattainment designation there, provides no basis for overturning the designations at issue in this case.

C. EPA's Interpretation of the Word "Contribute" is Consistent With the Clean Air Act and the Agency's Long-Held Interpretation of that Term

After failing to establish that EPA made an arbitrary and capricious technical determination based on what Sierra Club agrees is the applicable five-factor weight-of-the-evidence test, they have only one recourse: allege that EPA applied the wrong legal standard. Sierra Club does not allege that EPA misinterpreted or misapplied what the word "contribute" means in the designation provision at issue, 42 U.S.C. § 7407(d)(1)(A). Instead, Sierra Club argues that EPA's designation of Atascosa, Comal, and Guadalupe Counties must be overturned because it is inconsistent with how EPA applies a wholly different provision of the CAA, one that has nothing to do with the designation process.

Neither the specific provision at issue here nor the statute itself defines the word "contribute" or "contribution" in the context of determining whether an area does or does not contribute to ambient air quality in a nearby area. *Catawba County*, 571 F.3d at 35; 83 Fed. Reg. at 35,138/1. As outlined *supra*, this means that Congress delegated to EPA the authority to fill this statutory gap by, in this

case, defining when one area contributes to the nonattainment of nearby area such that it should itself be deemed nonattainment.

Filling this gap, EPA has consistently interpreted "contribute" to mean those counties or areas that "sufficiently contribute" to nonattainment of another county, and this is the definition that has been applied by the courts. *Catawba County*, 571 F.3d at 39 ("[R]easonably exercising the discretion that Congress delegated to it, EPA interpreted 'contribute' to mean 'sufficiently contribute' . . . [and] "Petitioners offer no plausible reason to think that the statute forecloses this approach."). The same is true here. Sierra Club acknowledges that EPA has consistently applied this standard and neither asserts that EPA lacks authority to make its area designations based on whether a county "sufficiently contributes" to the nonattainment of a nearby county. Sierra Club Br. 7-10, 13-14, 37-38; C.I. 0356 at 24. Thus, EPA does not base a nonattainment designation of a nearby county on any potential migration of emissions whatsoever from a given source or sources to a nearby county. Instead, it is based on a discernable contribution that is sufficient – as determined by the five-part weight-of-the evidence analysis – to warrant a nonattainment designation on contribution grounds.

In an effort to make an end run around the five-part weight-of-the evidence test, Sierra Club argues, under the pretext of arguing what the term "contribution" means, that there is an absolute bright-line test to assessing whether a county

sufficiently contributes to the nonattainment of a nearby county. Sierra Club argues that if a county contributes 1% of the ozone to a violating county, it must be deemed to contribute to that county and thereby be deemed nonattainment based on that contribution. Sierra Club Br. 39-41. Sierra Club then focuses on Texas's photochemical source apportionment modeling, arguing that this modeling predicts that each of the Nearby Counties contributes between 6%-8% of the ozone pollution to violating monitors. Sierra Club Br. 4, 14 (citing the photochemical modeling in the Alamo Council report, C.I. 0297 at 6-4 to 6-6).[20]

But Sierra Club finds its 1% threshold nowhere in the statutory provision at issue, 42 U.S.C. § 7407(d)(1), or in any provision relating to the designation process, or in EPA's regulations applying such provisions. Instead, Sierra Club cites to what is termed the "Good Neighbor" provision of the separate statutory section dealing with SIPs, 42 U.S.C. § 7410(a)(2)(D). Sierra Club then asserts: (a) that there is a bright-line 1% threshold for assessing contributions from other states under the Good Neighbor provision; and (b) that same absolute threshold *must* be applied under section 7407(d)(1)(A) when assessing whether one county contributes to nonattainment at the monitor of a nearby county, and if EPA does

[20] The Alamo Council report is apparently misnumbered as it contains two sets of pages numbered 6-1 to 6-6, which have different content. Sierra Club appears to cite to the first set of pages numbered 6-4 to 6-6, which is what EPA addresses herein.

not apply this singular test, it must explain why. Sierra Club Br. 38-41. This argument fails on multiple bases.

First, there is no legal basis to apply the parameters (purported 1% bright-line test) applied under the Good Neighbor provision of the SIP program to EPA's designation of counties as attainment or nonattainment under the separate designation provision. While SIPs, including Good Neighbor interstate requirements, are governed by section 7410, "[d]esignation of nonattainment areas is governed by section 107(d) of the Clean Air Act, § 7407(d)." *Catawba County*, 571 F.3d at 32. *See also Mississippi Comm'n*, 790 F.3d at 152 (explaining how the provisions of 42 U.S.C. § 7407, which deal with contributions from "nearby area[s]" to make attainment decisions, is different from the Good Neighbor transport provisions of 7410, with the latter addressing "other statutory provisions specific to long-range ozone transport.").

In recognition that air quality issues do not end at a state's border, one subsection of the SIP program, the "Good Neighbor" provision, declares that a SIP must "contain adequate provisions prohibiting . . . any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will contribute significantly to nonattainment in, on interfere with maintenance by, any other State with respect to [the NAAQS]." 42 U.S.C. § 7410(a)(2)(D)(i)(I). The provision at issue in this case deals explicitly with

designations of counties for attainment/nonattainment, not long-range interstate transport.

Sierra Club argues that the 1% figure used in EPA's analysis conducted in conjunction with Good Neighbor regulations must be applied by analogy. Yet it identifies no legal basis requiring this: no regulation, no Congressional statement, and no legal authority. Instead, Sierra Club simply declares: "In sum, EPA has consistently found that pollution impacts greater than one percent of the applicable NAAQS are 'significantly' contributing to nonattainment." Sierra Club Br. 42. But Sierra Club fails to cite to a single instance where EPA has applied 1% as a litmus test to make area designations under 42 U.S.C. § 7407(d)(1)(A), the provision at issue in this case. Sierra Club implies that such a threshold was applied with regard to Wise County under the 2008 NAAQS (Sierra Club Br. 41). As outlined above, that clearly is not the case as instead EPA conducted its normal five-part weight-of-the-evidence test which the court considered in detail in *Mississippi Comm'n*. 790 F.3d at 164-174.

Second, there is no actual 1% bright line test, even under the Good Neighbor section of the SIP statutory provision. Sierra Club asserts that there is a "one percent threshold for determining whether an upwind state 'significantly contributes' to nonattainment." Sierra Club Br. 39, n.21. But the "one percent" measurement is just the starting point and is, in fact, used to automatically

eliminate a neighboring state from further consideration as a contributor under the Good Neighbor requirements. As the Supreme Court explained:

> Under the Transport Rule, EPA employed a "two-step approach" to determine when upwind States "contribute[d] significantly to nonattainment," id., at 48254, and therefore in "amounts" that had to be eliminated. At step one, called the "screening" analysis, the Agency excluded as *de minimis* any upwind State that contributed less than one percent of the three NAAQS to any downwind State "receptor," a location at which EPA measures air quality. *See id.*, at 48236-48237. If all of an upwind State's contributions fell below the one-percent threshold, that State would be considered not to have "contribute[d] significantly" to the nonattainment of any downwind State. *Id.*, at 48236. States in that category were screened out and exempted from regulation under the rule.

EPA v. EME Homer City, 572 U.S. at 501-02.

States not screened out using the 1% level are subjected to a second inquiry to determine if they significantly contribute to downwind nonattainment, which the Court in *EME Homer City* referred to as the "control analysis." *Id.* The control analysis looks at the availability of emissions reductions from upwind sources, considering the costs and air quality benefits in different potential control scenarios. A source will not be determined to significantly contribute and thus not be required to take action unless EPA concludes that cost-effective actions to reduce emissions are available. *See* 76 Fed. Reg. 48,208 48,262 (Aug. 8, 2011) (EPA did not find the District of Columbia significantly contributed and imposed no emission reduction obligation on District of Columbia despite surpassing a 1%

initial threshold, because no cost-effective emission reductions are identified); 81 Fed. Reg. 74,504, 74,518-19, 74,553 (Oct. 26, 2016) (same as to Delaware).[21]

Moreover, Petitioners are incorrect in asserting that EPA has always used a 1% threshold to define "significant contribution" under the Good Neighbor provision. In prior rulemakings EPA also has considered other factors to determine if the air quality portion of the analysis is met, including the magnitude, frequency, and relative amount of contribution from the upwind states. *See* 70 Fed. Reg. 25,162, 25,191/3 (May 12, 2005). Thus, there is no absolute 1% threshold, even under the provisions of the statute from which Sierra Club borrows.

Third, even if there was a 1% general threshold, it is of limited application here because Sierra Club misapprehends the percentages reported by Alamo Council in its modeling. The 6%-8% contribution to ozone of the three Nearby Counties that Sierra Club relies on applies only when artificially limiting potential contributions to the 8-county San Antonio area. But, as Sierra Club and EDF themselves explain (*supra* pp. 74-75), much of the contribution to the ozone at the

[21] Just as the courts have upheld EPA's interpretation of "contribute" as "sufficiently contribute" under the Designation provision, *see* p. 85, *supra*, courts have similarly upheld EPA's multi-stepped determination of "contribute significantly" under the Good Neighbor provision, finding EPA's two-step approach to interpreting "contribute significantly" to be "an efficient and equitable solution to the allocation problem the Good Neighbor Provision requires the Agency to address." *EPA v. EME Homer City*, 572 U.S. at 492.

two Bexar County violating monitors comes from beyond the 8-county San Antonio area. In applying the Good Neighbor provision under a separate statutory provision, EPA does not artificially limit the study area in determining whether a given state contributes more than 1% to the air quality of a downwind state.

The question for EPA in making a designation based on contribution is how much each county contributes, not how much each country contributes when one artificially limits the area of potential contribution by excluding other source counties and areas. The answer (based on modeled projections for 2023) appears in the very pages of the Alamo Council report relied upon by Sierra Club. As reflected in the table at p. 6-5 of C.I. 0297, the predicted contributions of ozone of the three Nearby Counties during days at or above 70 ppb to the two violating monitors in Bexar County are as follows: Monitor C58: Atascosa-0.9%; Comal–0.1%; Guadalupe-1.6%; Monitor C23: Atascosa-1.2%; Comal-0.1%; Guadalpe-0.9%. *See also id.* at 6-4 (providing explanation). Thus, in four cases the three subject counties are predicted to contribute *less than 1%* of the ozone to the violating monitors, and in the other two cases, barely above 1%.

Fourth, as noted, the photochemical source apportionment modeling relied on by Sierra Club is of limited use in assessing present nonattainment. It is based on 2012 data to make projections into the future and at no time over the sustained, required three-year period. *See* p. 55, *supra*. Additionally, it bases projections on

"generic ozone season days instead of day-specific emissions." C.I. 0297 at 3-3. And the projections relied upon by Sierra Club are for the year 2023. *Id.* at 6-4 to 6-6.

"This court has previously acknowledged that photochemical grid modeling is a complex scientific determination." *Galveston-Houston*, 289 Fed. Appx. at 749, citing *BCCA Appeal Group*, 355 F.3d at 834. As such, EPA is entitled to extreme deference with regard to how it considers and analyzes such modeling in formulating conclusions about potential contributions. *See* pp. 77-79 *supra*. EPA's consideration of this modeling in finding a lack of evidence to support a nonattainment designation based on contribution, particularly when the data relied on shows that the ozone contributions from each of the three counties is below or, in a few cases, just slightly above 1% based on future predictions, is to be accorded extreme deference and should be upheld.

Fifth, Sierra Club's focus on a single estimate from Texas's model of future (2023) ozone levels as the singular basis to make a present contribution finding ignores the fact that EPA applies a "holistic, multi-factor, totality of the circumstances test for making NAAQS determinations." *Mississippi Comm'n v. EPA*, 790 F.3d at 169. Indeed, "we have twice iterated that, when using the multi-factor test, 'discrete data points' are *not* determinative because isolating any one discrete consideration ignores the very nature of the . . . test, which is designed to

analyze a wide variety of data on a case-by-case basis." *Id.* (emphasis in original, citations omitted). *See also Masias v. EPA*, 906 F.3d at 1080; *ATK Launch Systems*, 669 F.3d at 336; *Catawba County*, 571 F.3d at 46.

Moreover, with regard to designations under 42 U.S.C. § 7407(d)(1)(A), the courts have "made explicit that EPA does not violate the Act even if it fails to adopt 'a bright-line, objective test' for determining contribution." *Mississippi Comm'n*, 790 F.3d at 150. And this is true explicitly with regard to identifying a single percentage of ozone contribution that some contend would establish contribution warranting a nonattainment designation. As explained in *Catawba County*, 571 F.3d at 39:

> We also reject petitioners' argument that EPA violated the statute by failing to articulate a quantified amount of contribution that would trigger a nonattainment designation. Petitioners apparently prefer a bright-line, "objective" test of contribution [citation omitted], but it is the statute, not petitioners' preferences, that constrains EPA's discretion. And nothing in the statute compels EPA to quantify a uniform amount of contribution below which counties will automatically escape nonattainment designations or to quantify similar thresholds for the nine [now five] factors EPA evaluated in making those determinations. . . . Nor do we agree with petitioners that EPA's failure to quantify its analysis somehow rendered its interpretation of "contribute" arbitrary and capricious and therefore unreasonable. [Citation omitted]. An agency is free to adopt a totality-of-the-circumstances test to implement a statute that confers broad discretionary authority, even if that test lacks a definite "threshold" or "clear line of demarcation."

See also Mississippi Comm'n, 790 F.3d at 161 (In applying the five-part test, there is "'no bright line for any of the factors,' [ ] with each factor 'weighted considering

the unique circumstances of each nonattainment area.'"); 83 Fed. Reg. at 35,138/1 ("EPA does not interpret the statute to require the agency to establish bright line tests or threshold for what constitutes 'contribution' or 'nearby' for purposes of designations."); C.I.0061 (2015 Guidance) at Attachment 3, p.1.

"There is a presumption of regularity to the EPA's choice of analytical methodology, so challenging parties must overcome a 'considerable burden.'" *Galveston-Houston*, 289 Fed. Appx. at 749, quoting *BCCA Appeal Group*, 355 F.3d at 832. Sierra Club has not overcome that considerable burden by asserting that EPA is required to abandon its long-used and unchallenged five-part weight-of-the-evidence test, in favor of a bright-line threshold, borrowed from regulations implementing a separate, inapposite statutory provision dealing with a different facet of the NAAQS process, which even there is not employed as an absolute threshold.

Based on the exercise of its expertise in reviewing the data, EPA's conclusion that the Nearby Counties do not sufficiently contribute to Bexar County's nonattainment such that they too should be subjected to instituting specific emission reduction actions, should be deemed neither arbitrary and capricious nor inconsistent with the definition of the term "contribution."

CONCLUSION

For the foregoing reasons, all Petitions for Review should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FILING REQUIREMENTS

This brief complies with the type-volume limitation of Fed. R. App. P. 32 (a)(7)(B) as modified by this Court's Order of October 26, 2018, because this brief contains 22,755 words, excluding the parts of the brief exempt under Fed. R. App. P. 32 (a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typeface style requirements of Fed. R. App. P. 32(a)(6) because the brief was prepared in proportionally spaced typeface using Microsoft Word 14 point Times New Roman type. As such, this brief also complies with Fifth Circuit Rule 32.

It is hereby certified that: (a) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (b) the electronic submission is an exact copy of the paper version, as required under Fifth Circuit rule 25.2.1; and (c) the document has been scanned by software maintained by the Department of Justice and is free from viruses.

So certified this 8th day of March, 2019 by

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Respondents was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of said filing to the attorneys of record for Petitioners and all other parties, who have registered with the Court's CM/ECF system.

Date: March 8, 2019

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